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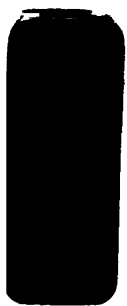
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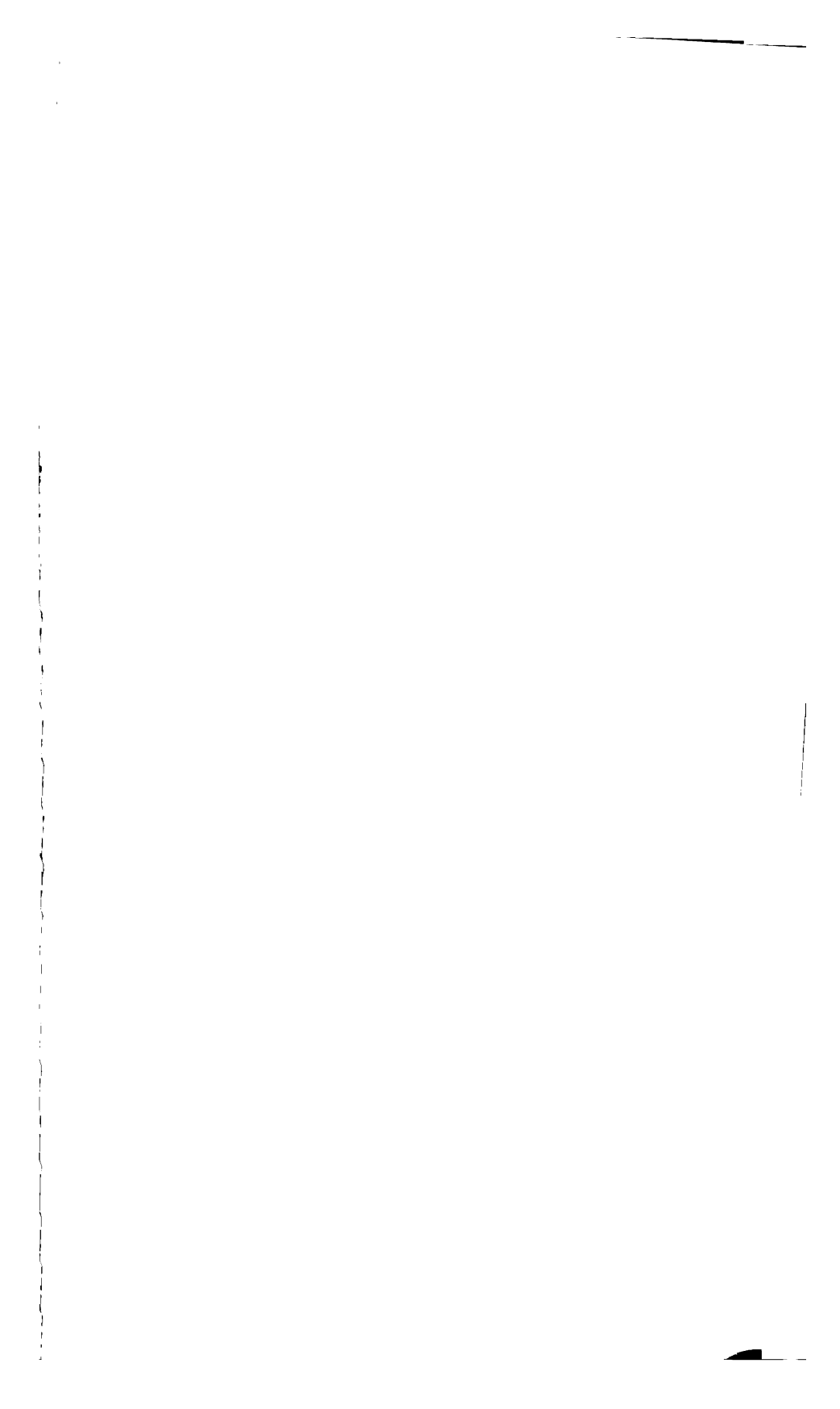
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1886.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-OPERATION AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

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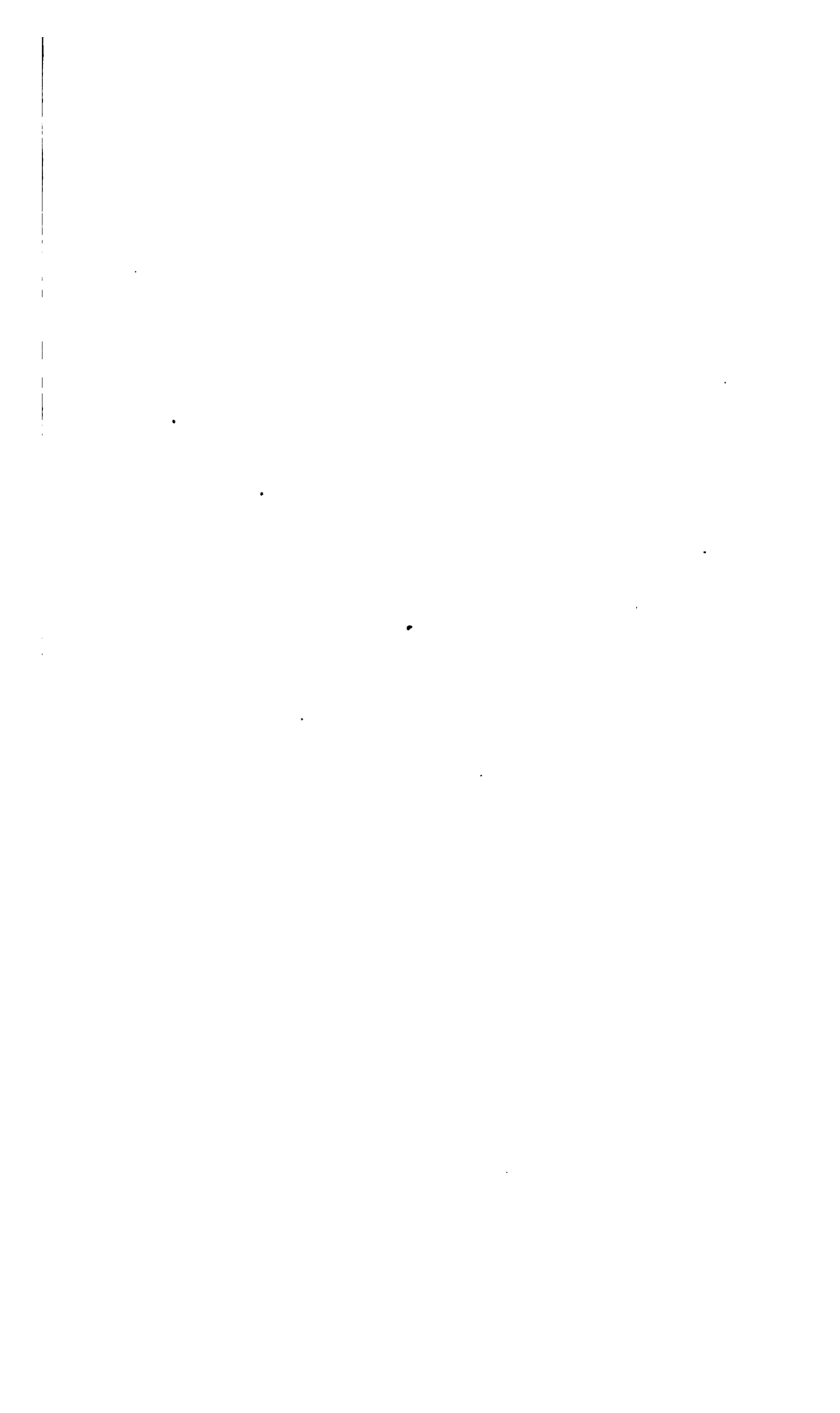
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AMERICAN DECISIONS.
VOL LXXV.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

Root v. McFERRIN.

[37 MISSISSIPPI, 17.]

TITLE TO REAL ESTATE OF ANCESTOR, ON HIS DEATH, VESTS IMMEDIATELY IN HIS HEIRS, and can only be divested by their own voluntary act, or by the judgment or decree of a competent court, by due course of law. CONSTITUTION OF MISSISSIPPI HAS NOT CONFERRED UPON PROBATE COURT JURISDICTION OVER LAND of decedent for any purpose whatever. It is only by virtue of the special conditional power conferred by the legislature, and restricted in its exercise to the happening of the particular event named in the act, that the probate court can assume to exert any jurisdiction over such land.

PROBATE COURT HAS NO POWER TO ORDER SALE OF LAND, until the jurisdictional facts and acts prescribed by law have been judicially ascertained of record. But after the fact of jurisdiction is established in the record, over both the subject-matter and the person, then all the presumptions arise in favor of its judgments, which inherently belong to courts of original general jurisdiction.

JURISDICTION CONFERRED ON PROBATE COURTS BY CONSTITUTION IS GENERAL; but the jurisdiction over lands of decedent conferred upon them by the legislature is special, inferior, and limited.

NO PRESUMPTION IS INDULGED IN FAVOR OF PROCEEDINGS OF COURT OF SPECIAL AND LIMITED JURISDICTION, but the power to act must appear on the face of the proceedings.

RECORD MUST AFFIRMATIVELY SHOW THAT NOTICE REQUIRED BY STATUTE WAS GIVEN TO HEIRS, in a proceeding in the probate court by the administrator for the sale by him of the lands of his intestate for the payment of debts, and parol evidence is not admissible, in such case, to supply an omission in the record in that respect.

EVIDENCE OF VALUE OF IMPROVEMENTS MADE BY DEFENDANT IS ADMISSIBLE in an action of ejectment, where damages are claimed by the plaintiff.

VOID DEED OF ADMINISTRATOR IS ADMISSIBLE UNDER PLEA OF STATUTE OF LIMITATIONS, in an action of ejectment by the heirs against the grantee, to show the fact of possession under it and the *quo animo* with which such possession was taken.

NO SUBSTANTIAL DIFFERENCE EXISTS BETWEEN COPARCENERS AND TENANTS IN COMMON, under the Mississippi statutes of descent and partition.

INTERESTS OF HEIRS IN REALTY OF INTESTATE MAY BE REGARDED AS JOINT AND SEVERAL to some extent, under the Mississippi statutes; while all may join in an action of ejectment, each heir is entitled to his distinct share in severalty. The rights of the one, although connected with, are by no means dependent upon and inseparable from, the rights of the other. The right of one may therefore be barred by the statute of limitations, and that of another be unaffected thereby.

EJECTMENT by the heirs of Aaron Root against McFerrin, to recover possession of a section of land of which the plaintiffs' ancestor died seised. The defendant pleaded the general issue, with notice of a claim for the value of the improvements made on the *locus in quo*, before the action was commenced. The jury found for the defendant as to the plaintiffs James A. Root, Miles Carey, and his wife, Sarah Jane Carey, and Harriet H. Couch; and they found for the plaintiffs Margaret L. Root, Elizabeth C. Root, and Thomas J. Root, together with nine hundred dollars for the rents and profits; and they further found that the defendant had made valuable improvements, to the value of three thousand one hundred dollars. The plaintiff Harriet H. was married on the sixth of July, 1847. The other facts are stated in the opinion.

Watson and Craft, and Clapp and Strickland, for McFerrin.

H. R. Miller, W. S. Featherston, and T. W. Harris, for Root's heirs.

By Court, **HARRIS, J.** This writ of error is prosecuted here by both parties.

The plaintiffs in error commenced their action of ejectment in the circuit court to recover of the defendant the land in controversy, claiming title to it as the heirs at law of Aaron Root, deceased, their father, who died seised thereof. From the record, it appears that Benjamin C. Anderson, as his administrator, sold the land in controversy on the fifth of October, 1840; that the purchaser took possession under his purchase immediately, and he, and those claiming under him, have held the same ever since; and that defendant claims title under this purchase. The respective ages of plaintiffs appear in the record.

It is objected to defendant's title that it is void, because the

probate court had no power to order the sale of the real estate of said decedent for the payment of his debts, unless in compliance with the statute specially conferring that power.

To support his title, defendant offered in evidence deeds from Anderson, administrator, and others, deducing title from said administrator to himself, and then offered the records of the probate court of Pontotoc county to show the authority of Anderson, as administrator, to sell the land. To this record, as evidence in the cause, plaintiffs objected, because it shows no citation executed according to the statute by posting and publication, and no notice, either actual or constructive, to the "persons interested in said lands," to appear and show cause "why so much of the lands of said intestate should not be sold as will be sufficient to pay his debts;" which objection was sustained by the court, so far as the said records were offered as evidence of authority in the administrator to sell the land of said decedent; but the same was admitted under the plea of the statute of limitations. To this ruling of the court both parties excepted, and filed their bills of exceptions. Along with said record, defendant also offered the deposition of B. C. Earle, tending to show that while the records of the probate court of Pontotoc county were not mutilated or lost, they were still not as full and perfect and formal as they should have been; witness could not say that anything actually done by the court was omitted in the minutes; but that he went into the office in 1849, and found the papers of the office in a confused condition.

Defendant also offered to prove by Falconer that in 1840 the Holly Springs Banner (the paper in which the citation referred to was ordered to be published) was conducted and published at Holly Springs by one Foster, who had left the state, and is now beyond its limits; that no file of said paper is in existence; and that the receipt, produced and offered in evidence, from said Foster to Anderson, as administrator of decedent, for "advertising citation on the twenty-first of April, 1840," and "notice to all persons, on the nineteenth of June, A. D. 1840," was in the handwriting of said Foster. To all which testimony offered with said record plaintiffs objected, and this objection was sustained, and defendant excepted.

Defendant next introduced one Teel as a witness, who proved that valuable improvements were made on the premises by defendant, worth six thousand dollars, including cost of putting apple and peach orchards (estimated at two hundred and fifty dollars) on the land.

To this testimony as to the cost of the orchard plaintiffs objected. The objection was overruled, and plaintiffs excepted.

The evidence here closed, and the plaintiffs asked the following instructions:

If the jury believe from the evidence that the plaintiffs were all minors at the time the cause of action accrued, then the statute of limitations did not begin to run against any one of them until all were of age, and they must find for the plaintiffs.

Defendant objected to this charge, and in lieu thereof requested the following:

1. That if the jury believe from the evidence that on the twenty-fourth day of February, 1844, one of the plaintiffs had attained the age of twenty-one years, and was not at that time a married woman, insane, without the limits of the United States, or personally imprisoned, and that this action was not brought until after the lapse of three years from the twenty-fourth day of February, 1844; and if they further believe from the testimony that the land sought to be recovered in this action was sold by the administrator of plaintiffs' father, by virtue of an order of the probate court of Pontotoc county, fairly and in good faith; and that the purchaser at such sale paid the purchase-money therefor; and the land has been held adversely under said sale since the year 1841; and that the plaintiffs claim said land as the heirs of Aaron Root, deceased—then they must find for defendant.

2. That if they believe from the evidence that any one or more of plaintiffs were twenty-one years of age, and not under any disability to sue, as much as five years before the bringing of this suit, and that during that time the land sued for has been held adversely by the defendant, and those under whom he claims, they must find for the defendant.

All of which charges were refused by the court. But in lieu thereof, the court gave the following: "If the jury believe from the evidence that any of the plaintiffs were of the age of twenty-one years at the time of the passage of the act of 1844, and the suit was not brought within three years from that date, or that any of said plaintiffs were minors at the date of that act, and the suit was not brought within five years of their coming of age, in either case they will find for defendants as to them; but as to the other plaintiffs, if any were under age at the date of the act of 1844, and had not reached their majority more than five years before the commencement of this suit, they will find for them, as if they had sued without joining the others."

To the refusal of the court to give the charges requested, and to the giving the one so given by the court, both parties excepted respectively.

The errors assigned may be classed under the following heads:

1. The court erred in refusing to allow the record of the probate court of Pontotoc county to be read to the jury as evidence of the authority of the administrator to make sale of the land in dispute; and in allowing it to be read under the plea of the statute of limitations, in connection with the administrator's deed, as evidence of adverse possession; 2. The court erred in the exclusion of the testimony of Earle and Falconer; 3. The court erred in permitting the testimony of witness Teel, in relation to the value of the orchards, to go to the jury; 4. The court erred in refusing the charges asked, and giving that submitted to the jury; 5. The court erred in refusing a new trial.

1. For the defendant, it is insisted that the exclusion of the transcript of the record, offered in evidence, as tending to show legal authority in the administrator to sell this land, was erroneous.

And we are earnestly urged to review the repeated decisions of this court on the point now submitted, on account of a supposed inconsistency between the doctrines of the earlier and late cases.

We have carefully considered the arguments, briefs, and references made by counsel and submitted to us, with a view to discover what, if any, inconsistency in principle exists in the cases referred to, from *Campbell v. Brown*, 6 How. (Miss.) 230, down; and while it may be perhaps admitted that in our own as well as other reports there has not been as much regard paid to technical accuracy in the language employed, in stating and applying the distinctions between courts of special and limited authority and those of original and general jurisdiction, as might be desirable, yet we are unable to perceive the great inconsistency relied on by counsel for the defendant. On the contrary, the language cited, when considered with relation to the facts before the court, and the subject it was employed to discuss in each case, considering their number, will be found to be in singular harmony with the able opinions contained in our earlier reports on this important subject: *Moore v. Cason*, 1 How. (Miss.) 62; *Vick v. Mayor etc. of Vicksburg*, Id. 444 [31 Am. Dec. 167]; *Smith v. Winston*, 2 Id. 604.

It has been held, with unvarying uniformity as well as unanimity, that a decree by the probate court, and sale of the land

of a decedent without the citation and notice required by the statute, appearing either by positive evidence or recital in the record, is void; not only as against its express provisions, but because it stands opposed to the universal principle of law and common justice, that no man can be deprived of his rights or concluded in any manner by the judgment of a court, without notice of the proceedings against him, either actual or constructive.

Such is the doctrine announced by Judge Trotter in *Campbell v. Brown*, 6 How. (Miss.) 234; *Gwin v. McCarroll*, 1 Smed. & M. 351; *Enos v. Smith*, 7 Id. 85; *Ridley v. Ridley*, 24 Miss. 648; *Williams v. Childress*, 25 Id. 78; *Steen v. Steen*, Id. 513; *Joslin v. Caughlin*, 26 Id. 134; *Gelstrop v. Moore*, Id. 206 [59 Am. Dec. 254]; *Currie v. Stewart*, Id. 646; S. C., 27 Id. 52 [61 Am. Dec. 500]; *Lee v. Gardiner*, 26 Id. 543, is not inconsistent with this doctrine; so also *Gelstrop v. Moore*, Id. 209 [59 Am. Dec. 254]; *Joslin v. Caughlin*, Id. 141; *Hardy v. Gholson*, Id. 72; *Currie v. Stewart*, Id. 648; *Wall v. Wall*, 28 Id. 413; *Cason v. Cason*, 31 Id. 592, 593; *Hutchins v. Brooks*, Id. 432; *Henderson v. Winchester*, Id. 294; *Lee v. Bennett*, Id. 128; and *Servis v. Beatty*, 32 Id. 86, 87.

On the death of the ancestor, the title to his real estate vests immediately in his heirs, and can only be divested by their own voluntary deed or act, or by the judgment or decree of a competent court, "by due course of law." The administrator, as such, has no interest in or power over the land belonging to his intestate at his death; nor has the probate court jurisdiction over it for any purpose whatever, by the constitution, or inherently in the nature of its organization. It is only by virtue of the special, conditional power, conferred by legislative grant, and restricted in its exercise to the happening of the particular event named in the act, that the probate court can assume to exert any jurisdiction over land which by law is vested in the heir. Until the happening of the condition or event specified in the act, no power or jurisdiction is permitted by the statute to be exercised by either the court or its officers over land. The particular "jurisdictional facts and acts" prescribed by law must first happen in each particular case, and be judiciously ascertained of record, before the power of the probate court to order the sale of land attaches: 1. There must be a report of insolvency by the administrator, exhibiting an account of the personal estate and debts of the estate to the court; 2. Citation must issue to all persons interested therein; 3. This citation

must be posted and published, requiring the attendance on a given day, according to the statute; 4. At the time specified in said citation, or some other appointed time, the court shall hear and determine the allegations and proofs, as to the existence of these "jurisdictional facts," upon which its power depends.

If the judicial investigation should prove that the personal estate is insufficient for the payment of the debts, and the persons interested and notified to attend show no good cause to the contrary, then for the first time has attached this special, limited jurisdiction to order the sale of the land belonging to the heirs of the estate thus reported insolvent.

Jurisdiction must be thus acquired in each case over the parties, and over the subject-matter, by the happening of the event and the performance of the conditions named in the act, before the court can make the order of sale; and the record must show on its face these jurisdictional facts, or that they were established to the satisfaction of the court on the hearing of the allegations and proofs submitted to it.

To hold that these important facts, upon which the statute has made the power of the court to depend, shall rest alone in the uncertain memory of the probate judge or casual by-standers or parties, would be to make the discretion of the court the only limitation upon its powers. The infant and absent heirs, for whose benefit this power has been so peculiarly limited and restrained, in a very few years might search in vain for the real truth among the false "presumptions" which are invoked for its concealment.

The record must show that in the judgment of the court every fact existed and every act had been done which was necessary to give the court jurisdiction, though the evidence upon which that judgment was founded need not appear.

After the fact of jurisdiction is established in the record, both over the subject-matter and the person, then all the presumptions arise in favor of their judgments, in these courts of special and limited jurisdiction, which inherently belong and are applied to courts of original general jurisdiction.

In the one case, the court's power and jurisdiction is self-existing, inherent, always ready to be exercised over that subject, without a precedent investigation to ascertain certain facts upon which to found its action. It is hence called "original," because beginning with its constitution and not attaching after the happening of some event or fact which calls its power into being. It is called "general" because it applies to all subjects

embraced within the object of its original organization, and to all parties who can be reached by its process and bound by its power. But in the other (a court of special and limited jurisdiction), its powers are dependent, inferior, and derivative; not inherent, superior, and original. Until the facts upon which its authority depends are shown to exist, it has no vitality. As soon as it has performed the particular duty enjoined upon it, the power ceases. We must be careful to separate in our minds the general powers of the probate court, as organized under the constitution, from those of the probate court exercising a special authority not derived from the constitution, but delegated by the legislature over a particular subject and under certain particular circumstances.

This doctrine finds its sanction everywhere in the analogies furnished by legal science.

It is the same distinction existing between the general rights of ownership and a special trust; between the rights and powers of the principal and the special and limited authority of the agent; between a general power and a special power to do a particular thing; between original power and delegated authority; between superior and subordinate. While the law regards with favor and confidence the acts of the one class, and indulges every presumption of their regularity and propriety, it watches with extreme jealousy the conduct of the other. Hence the reason of the rule, that in all cases of special and limited authority or jurisdiction, the power to act must appear on the face of the proceedings, and no presumptions in favor of its existence will be indulged.

The rule is universal in all courts, and independent of statutory enactments, that the record must affirmatively show that the party whose rights are directly and immediately the subject of litigation had notice, either actual or constructive, of such proceedings, before he can be bound or concluded thereby.

No matter whether the court be one of original and general or of special and limited jurisdiction, it must appear in either case on the face of the record that it had jurisdiction by the constitution or laws of the land, both of the parties and the subject-matter, before it can deprive the citizen of his rights or property by its judgments.

It is a familiar principle that a judgment is conclusive upon parties and privies when the court has jurisdiction to render it. Unless such jurisdiction exists, the judgment is a nullity, and may be impeached collaterally. The jurisdiction must extend to the parties as well as the subject-matter.

The great reason why judgments should be regarded as thus conclusive is, that there may be an end of litigation. *Sit finis ad litem*. Public policy demands submission to judgments that have been fairly invoked, fully considered, and finally pronounced; but neither justice, public policy, nor the organic law of the state will sanction the denial of the right to be heard by himself or counsel, or both, to any citizen. The constitution declares that political power is inherent in the people; that free governments are founded on their authority, and established for their benefit; that even for crimes no man shall be deprived of life, liberty, or property but by due course of law; that the courts shall be open, and every person, for injuries of every character, shall have remedy by due course of law, and justice and right shall be administered without sale, denial, or delay; that no person shall be debarred from prosecuting or defending his cause before any tribunal in the state.

In violation of these rights and prohibitions, designed to protect the liberty and property of the citizen, the courts established "for his benefit," and to administer "right and justice without sale, denial, or delay," can pronounce no valid judgment. The opportunity to avail himself of these rights is as essential as the rights themselves, and inseparably incident to them; and hence this doctrine of "notice" is applicable alike to all tribunals and all judgments under our system. It cannot be tolerated that the doors of justice should be closed against a party who has never heard that his rights were in dispute in the courts, or had an opportunity to defend them. The whole policy and practice of our courts, under the principles of the organic law to which we have just referred, reprobate and condemn such a doctrine. The most liberal policy is extended to the citizen, whether plaintiff or defendant, by our laws. Forms are abolished in pleading, amendments allowed, new trials granted, bills of review, appeals, and writs of error provided for, and courts of equity, with all their remedial powers, established, that right and justice may be administered without denial.

These rules and principles are mandatory to all the departments of government, and to none more beneficially for the protection of private rights than to the judicial department.

The hardship of these cases upon purchasers at administrators' sales, and the disquietude in such titles so frequently occurring, are urged upon us as reasons for reviewing the rule heretofore established. Rightly considered, there is no greater

hardship or disquietude resulting from the disregard of the act of the legislature under which the sales are made than from the disobedience and disregard of other laws, human and divine, resulting in loss of life, liberty, or property.

If men, with all the means of information which the law has wisely afforded, will not take the trouble to examine the validity of titles which they seek to acquire, but trust to the good faith as well as legal knowledge of administrators, or to the competency and integrity of the officers appointed by law, and will neither examine the records for themselves nor procure competent legal advice, always at hand, to know what they do, they should not expect courts to relieve them of the consequences of their own folly. It is simply a question between them and the heirs, often children, neither cognizant of their rights nor responsible for the errors and omissions complained of. Which shall lose the title? Upon whom shall the penalty fall? Upon the disobedient adult, or the passive, ignorant minor?

We think the rule is wise, just, well settled; and if disquietude results from its observance, it will generally fall on those who in all ages have warred against the law, the neglecters and violators of its wise and humane precepts.

We think, therefore, the rejection of this record, which was silent as to the posting and publication of citation, as required by law, and showed no notice to the parties interested, so far as it was offered as authority for the sale by the administrator, as well as the rejection of the evidence of Earle and Falconer, intended, doubtless, to supply by parol the omission in the record, was proper.

Was this evidence (the record and deed from Anderson) admissible under the plea of the statute of limitations? is the remaining point under the first head to be considered.

The fact of possession, and the *quo animo* with which it was commenced and continued, are questions distinct and separate from the validity of deeds or paper titles generally. That a deed is even void for want of some requisite of the law as evidence of a conveyance of the legal title, does not render it incompetent to establish extraneous facts unconnected with the question of a paper title to which it may have relation. For instance, it is evidence of the fact that such a deed, although invalid, was executed, should that fact be a matter of controversy, as it is evidence of any other fact which it tends to establish, when such fact is the matter in issue. Hence, under the plea of the statute of limitations, generally a void deed, record,

or proceeding may be introduced to show the fact of possession held under it, and the *quo animo* with which such possession was taken; as between the parties to such deed, record, or other conveyance, there could be no question of the truth of this proposition. And as mere acts and declarations of the vendee tending to show the character of his possession, and to qualify and explain the character of that contemporaneous act, they must be admissible as a part of the *res gestæ*, even where third parties are concerned.

We think, therefore, there was no error in allowing this testimony to go to the jury upon general principles. It is, however, much stronger when considered in reference to the peculiar provisions of the act of 1844, sec. 5, relied on in this case: Hutch. Code, 830.

It is said, however, on the part of the plaintiff below, that the judgment should be revoked because of the admission of the testimony of Teel, proving the value of putting the apple and peach orchards on the land.

The statute allows the jury to offset against any damages assessed by them in favor of the plaintiffs the value of all valuable, but not ornamental, improvements.

We think this testimony was competent for the consideration of the jury, as there is proof in the record that plaintiffs claimed damages, and this was proof of the annual value of the land.

It is next insisted by both parties that the court erred in giving the charge submitted to the jury, and in refusing their charges respectively.

The charge objected to asserts that if any of the plaintiffs were of age on the twenty-fourth of February, 1844 (date of the act of limitations), and suit was not brought within three years from that date, or if any were minors at the date of that act, and suit was not commenced in five years of their coming of age, in either case, the jury will find for the defendant as to them. But as to the plaintiffs who were under age at the date of said act, and had not reached their majority more than five years, the jury should find for them, as though they had sued alone.

From the record, it appears that suit was instituted on the twelfth of September, 1856; that Sarah Jane Carey was born October 1, 1822; James A. Root was born October 12, 1826; Harriet H. Couch was born June 8, 1828; Margaret A. Root was born December 18, 1831; Elizabeth C. Root was born May

6, 1833; Thomas J. Root was born January 5, 1838; Sarah Jane married Miles Carey, December 23, 1845; Harriet H. married — Couch, who died in the spring of 1856.

It is insisted by defendant's counsel that this is a joint action by six plaintiffs, and the recovery could only have been joint.

It is admitted that the principle established in *Jordan v. McKenzie*, 30 Miss. 32, in relation to joint rights, "that the disability of one or more joint owners will not save the rights of others, not so affected, from the operation of the statutory bar, and that when one joint owner is barred all are," has no application to realty in this state held by descent. Under our statutes of descent and partition, there is no substantial difference left between coparceners and tenants in common. Chancellor Kent, in the fourth volume of his commentaries, says that the distinction between them may be considered as essentially extinguished in the United States: 4 Kent's Com. 407.

The interests of the heirs in the real estate of the intestate, under our statutes, may be regarded as joint and several to some extent. While all may join in the action of ejectment as held by this court in *Corbin v. Cannon*, 31 Miss. 570, their rights are yet several and subject to partition. Each heir is entitled to his distinct and equal share of the whole in severalty. The rights of the one, although connected with, are by no means dependent upon and inseparable from, the rights of the other. There is, therefore, much reason for the distinction. In the case of joint owners of personal property, when the rights of some are extinguished by the statutory bar, each having only a joint and not a several interest in the subject, all are barred of a recovery for defect in their legal title. But in the case before us, where the interests partake of both characters, joint as well as several, the destruction of the rights of the one will not affect the legal title of the others. The case stands, therefore, as upon a joint and several demise at common law, where the jury may find for or against any number of the plaintiffs, as the evidence in their opinion may justify: See *Stevenson's Heirs v. McReary*, 12 Smed. & M. 58, and the eighteenth instruction for plaintiff, p. 26.

And especially is this so under the pleading act of 1850, sec. 15, where it is said "that in every stage of action the court shall disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. And no judgment shall be reversed or affected by reason of such error or defect.

Nor is the case before us affected by the decision in the case of *Masters v. Dunn*, 30 Miss. 264, where it is held that if, at the time a joint cause of action accrues to several plaintiffs, all of them be under a disability to sue, the statute of limitations will not commence running until the disability be removed from all.

This decision was made in an action of detinue for a slave, and only declares that the plaintiffs below (*Dunn et al.*) are within the saving of the act of limitations of 1822, not repealed by the act of 1844, as decided in *White v. Johnson*, 23 Miss. 68, and *Simmons v. Pickett*, 24 Id. 467. That clause of the statute does not embrace the action of ejectment; and hence this case is not within its operation, or the principle of the decision founded on it.

We think, therefore, there was no such error in this instruction, or in the verdict which is in accordance with it, as would authorize the interposition of this court.

Let the judgment be affirmed, each party paying half the costs.

ON DEATH OF ANCESTOR, TITLE TO HIS REAL ESTATE VESTS IMMEDIATELY IN HIS HEIRS, and can only be divested by their own act or by the judgment of a competent court in due course of law: *Hollman v. Bennett*, 44 Miss. 327; *Harrington v. Wofford*, 46 Id. 45; *Hargrove v. Baskin*, 50 Id. 197; *Moore v. Ware*, 51 Id. 211, all citing the principal case; see also *Beckett v. Selover*, 69 Am. Dec. 237, note 256.

PROBATE COURT CANNOT ORDER SALE OF REAL ESTATE unless everything necessary to give it jurisdiction of the person and of the subject-matter appears upon its records: See *Wyatt's Adm'r v. Rambo*, 68 Am. Dec. 89, note 100, where other cases are collected. An administrator's sale without notice to the heirs is void: *Beckett v. Selover*, Id. 237, note 256. The record must show that process had been issued and served upon all the parties to be affected by a decree of the probate court authorizing the sale of a decedent's real estate: *Martin v. Williams*, 42 Miss. 219, citing the principal case. Such a decree is void when there is an entire absence of summons to the parties required to be notified: *Stampley v. King*, 51 Id. 731, citing the principal case. But the recitals in decrees of probate courts are at least *prima facie* evidence of due and legal notice: *Monk v. Horne*, 38 Id. 103, also citing the principal case.

PROBATE COURTS, WHETHER OF GENERAL OR LIMITED JURISDICTION: See *Wyatt's Adm'r v. Rambo*, 68 Am. Dec. 89, note 101, where other cases are collected; *Soye v. McCallister*, 67 Id. 689, note 692; *Alexander's Heirs v. Maverick*, Id. 693; *Doolittle v. Holton*, Id. 745, note 748. After the fact of the jurisdiction of the probate court is established by the record, over the subject-matter and the person, then all the presumptions arise in favor of its jurisdiction that inherently belong to and are applied to courts of original and general jurisdiction: *Scott v. Porter*, 44 Miss. 366, citing the principal case.

NO PRESUMPTION PREVAILS IN FAVOR OF JURISDICTION OF INTERIOR COURTS: See *Morrow v. Weed*, 66 Am. Dec. 122, note 137, where the prior cases in this series are collected.

COPARCENARY AND ESTATES IN COMMON ARE REGARDED AS DIFFERENT in Maryland: See *Gilpin v. Hollingsworth*, 56 Am. Dec. 737; and it seems in Pennsylvania: See *Patterson v. Lanning*, 36 Id. 154.

STATUTE OF LIMITATIONS MAY RUN AGAINST ONE CO-TENANT and not against others who are within the saving clauses of the statute: *McFarland v. Stone*, 44 Am. Dec. 325, note 328, where other cases are collected; *Saunders v. Saunders*, 49 Miss. 330, citing the principal case; *Rauls v. Kennedy*, 58 Am. Dec. 289.

THE PRINCIPAL CASE IS CITED in *Hanks v. Neal*, 44 Miss. 229, and *Harrington v. Wofford*, 46 Id. 45, to the point that the power of the probate court to deal with the real estate of decedents is conferred by statute, and not by the constitution.

WESLEY v. STATE.

[37 MISSISSIPPI, 327.]

SLAVE CHARGED WITH HOMICIDE OF HIS MASTER OR OVERSEER cannot show, in defense, the violent and cruel character of the master or overseer in the government of his slaves, nor specific acts of severity and cruelty committed by him.

TO MAKE HOMICIDE JUSTIFIABLE ON GROUND OF SELF-DEFENSE, the danger must be either actual, present, and urgent, or the homicide must be committed under such circumstances as afford reasonable ground to the accused to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished.

MERE FEAR, APPREHENSION, OR BELIEF, HOWEVER SINCERELY ENTERTAINED by one man, that another designs to kill him, will not justify the former in slaying the latter, where the danger is neither real nor urgent.

IT IS ERROR FOR COURT TO CHARGE JURY UPON WEIGHT OF EVIDENCE, or to assume in its charge that any material fact is proved; but the appellate court will not reverse a judgment on the ground that such assumption was erroneously made, when the fact assumed as proved was so clearly established by the evidence that there was no room for the jury to doubt concerning it.

EVIDENCE OF GOOD CHARACTER OF ACCUSED OUGHT ALWAYS TO BE SUBMITTED TO JURY with the other facts and circumstances of the case. No precise or definite rule has been laid down by which to determine the weight to which such evidence is entitled in prosecutions for homicide; but it would be going a long way too far to lay it down as a fixed rule that proof of good character is sufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused.

INDICTMENT for murder. The facts are stated in the opinion.

Sale and Phelan, for the plaintiff in error.

T. J. Wharton, attorney-general, for the state.

By Court, SMITH, C. J. The plaintiff in error was indicted and tried for the murder of one William G. Ford, and convicted. A motion was made in the court below to set aside the verdict, and for a new trial, which was overruled; whereupon the defendant excepted, and has brought the cause before us by writ of error. The bill of exceptions taken to the judgment on the motion for a new trial contains the evidence in the cause, and presents the grounds of error relied on for a reversal of the judgment.

A detailed statement of the evidence is unnecessary, as it will be quite sufficient to refer to only such parts of it as may be requisite to a proper comprehension of the questions raised by the assignment of errors and discussed by counsel.

1. The first exception relates to the exclusion of certain evidence offered by the prisoner.

The deceased was, at the time of the alleged homicide, the overseer of one John A. Walker, and as such had under his control and management the accused, who was a slave and the property of the said Walker. The commission of the homicide by the prisoner, and the facts and circumstances immediately attending the perpetration of the deed, are distinctly proved. The testimony of Mrs. Ford, the only witness, as it appears from the record, who was present at the killing, shows very clearly that the prisoner, when he slew the deceased, was in no present danger, either real or apparent; and that there was not reasonable ground to apprehend that the deceased meditated taking the life of the accused, or designed to do him some great bodily harm, and there was imminent danger of such design being accomplished.

On this state of evidence, the prisoner offered to prove the general management of the deceased on the plantation where he was the overseer, "with reference to violence and cruelty;" and also to prove "specific acts of unmerciful severity" committed by him while acting as such overseer, which had come to the knowledge of the witness subsequently to the killing. This evidence was excluded, and the prisoner excepted. And this ruling of the court is assigned for error.

In the estimation of the law, to murder the most wicked is as great a crime as to murder the best and most innocent of the human species. Hence, as a general rule, it is held by all the

courts that on the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood, as well by the accused as others, to be a quarrelsome, vindictive, and dangerous man, is inadmissible. When, however, the character of the deceased is involved in the *res gestæ*, evidence in regard to it may be introduced; as when it is shown that the accused had reasonable ground to apprehend immediate danger to his life from the deceased, the character of the deceased, in connection with previous threats, etc., may be given in evidence as explanatory of the motives upon the defendant's action: Whart. Crim. L., sec. 641.

The courts in North Carolina, in Alabama and Tennessee, while acknowledging the general doctrine as above stated, have gone a step further, and hold that where the homicide has been committed under such circumstances as to create a doubt as to the character of the offense, the general character of the deceased may sometimes be given in evidence: *State v. Tackett*, 1 Hawks, 210; *Wright v. State*, 9 Yerg. 342; *Quesenberry v. State*, 3 Stew. & P. 315. As in the case last cited, where it was held that "if the circumstances of the killing were such as to leave any doubt whether the defendant had not been more actuated by the principle of self-defense than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated."

The principle here recognized is in conflict with the generally received doctrine on the subject, which, as we have seen, excludes evidence in regard to the general character of the deceased, except when it is involved in the *res gestæ*. But without asserting that extreme cases might not be presented in which evidence of the general vindictive, revengeful, and dangerous character of the party slain might properly be allowed to go to the jury as explanatory of the state of defense in which the defendant placed himself, although not strictly a part of the *res gestæ*, if the question here presented were tested by the doctrine laid down in the cases cited, it seems clear that the court did not err in ruling out the evidence. For here there is no pretense for the assumption that the homicide was committed under such circumstance as to create a doubt as to the character of the offense. And it is clear that the reasons upon which the rule in reference to the admissibility of evidence as to the general character of the deceased is founded apply with greater force where it is sought to introduce evidence in regard to specific acts of the deceased, or to prove the general tenor of his

conduct for a specified time and in relation to particular subjects.

But the real question involved in the exception is not whether in prosecution for murder it is competent, under any circumstances, for the defendant to prove the general revengeful and dangerous character of the deceased. It is whether the general management of slaves on a plantation by the deceased, as characterized by violence and cruelty, and whether specific acts of severity and cruelty committed by him, while acting in the capacity of an overseer, may be proved as circumstances going to justify a homicide by a slave, committed upon him while acting as such overseer.

Whether considered abstractly or in reference to the facts immediately connected with the killing in this case, it is manifest that the validity of this position rests upon the doctrine, not heretofore announced in this court, that in an indictment for a homicide committed by a slave upon his master or overseer, the violent and cruel character of the overseer or master in the government of his slaves, and specific acts of severity and cruelty committed by such overseer or master, may be considered by the jury in determining the guilt or innocence of the accused, although the killing may be proved to have occurred under circumstances which show that the party charged was at the time in no present danger, real or apparent, and that he had no reasonable ground for apprehending danger to life or limb from the deceased, or that the deceased designed to take his life or do him some great bodily harm, and there was imminent danger of such design being accomplished; in other words, that a slave charged with the murder of his master or overseer may excuse or justify the deed upon the ground that, being about to be chastised by his master or overseer, or being apprehensive that he would be punished for some real or imputed delinquency, from the known violent and cruel character of the deceased in the management of slaves, and from the fact he had been guilty of particular acts of great cruelty upon other slaves under his charge, he had good reason to apprehend, and in fact did believe, that some great bodily harm would be inflicted upon him, or that his life would be taken.

It is scarcely necessary to say that this proposition is utterly untenable. It lays down a rule which, if recognized by the courts, would produce the most disastrous consequences. If the slave, when he is about to be chastised, or has just reason to apprehend that he will be subjected to cruel and unmerited

punishment, be informed that, in order to escape, he may innocently slay his master or overseer, if he really believes that, by the apprehended punishment, his own life will be taken or greatly endangered; and that to make good his defense in a court of justice, it will be sufficient to prove the general violent and cruel conduct of the deceased in the government of slaves—the slave population of the state will be incited to insubordination and murder, and the life of the master exposed to destruction, either through the fears or by the malice of his slaves.

But the principle contained in the proposition, when applied to homicides committed by white persons, is equally untenable.

To make a homicide justifiable on the ground of self-defense, the danger must be either actual, present, and urgent, or the homicide must be committed under such circumstance as will afford reasonable ground to the party charged, to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished: Rev. Code, 601, sec. 34. Hence the mere fear, apprehension, or belief, however sincerely entertained by one man, that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent to render a homicide excusable or justifiable within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent: *State v. Scott*, 4 Ired. L. 409 [42 Am. Dec. 148]. A party may have a lively apprehension that his life is in danger, and believe that the ground of his apprehension is just and reasonable; but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the grounds upon which he acted. That is a question which the jury alone are to determine.

2. The next objection applies to the sixth charge granted in behalf of the state. The charge is in these words: "If a party, through mere fear of his life, there being no real or apparent danger, kill another, it is not justifiable."

In the argument of the exception to this instruction, it was contended: 1. That the charge was erroneous, because it admits or assumes that the homicide in question was, in point of fact, committed through mere fear; and 2. Because it denies that a killing through mere fear is justifiable.

If counsel are correct in their construction of the charge, it is certainly erroneous, but not for the reason assigned.

It would have been error if the court had said to the jury, The prisoner on trial committed the alleged offense through fear of his life; but a killing from mere fear, where the party killing is in no danger, either real or apparent, is murder; in other words, a homicide, where the party killing is in no danger, actual or real, and has no reason to apprehend danger, is murder. An instruction bearing such a construction would be something more than a charge upon the weight of evidence. It would, in effect, be a command to the jury to convict the prisoner.

Such, however, is certainly not the proper construction of the charge. It lays down a principle of law for the guidance of the jury in the most abstract form, leaving them perfectly free to weigh the evidence, and to determine whether or not the homicide was committed through mere fear of life. There is, hence, no objection to the charge, unless the position be tenable that a killing through fear or apprehension that the party's life is in danger, where, in point of fact, there was no real or actual danger, and no reason to apprehend any, is justifiable.

What we have said in reference to the first assignment of errors is a sufficient answer to this objection.

3. The next error assigned is, that the court erred in giving the fourteenth instruction requested by the district attorney, which is in these words: "That whether the defendant, at the time he struck the blow, intended to kill the deceased, or only intended to knock him down to effect his escape, in either case he is guilty of murder if he used such means as were calculated to endanger the life of the deceased, or to do him some great bodily injury."

The objection to this instruction is that it assumes, as proved, an important fact in the case, and hence is a charge upon the weight of evidence.

It is the peculiar province and exclusive right of the jury to weigh the evidence, and to determine the facts of a case submitted to their consideration. And the law is careful to guard against any invasion of their authority by the court. It is hence error for the court to instruct the jury as to the weight of the evidence before them, or to charge that any fact material to the issue was proved. For the same reason, it is improper for the court to assume, as proved, any fact involved in the issue, and make such assumption the basis of an instruction; for such an act would, in effect, be a charge upon the weight of evidence.

But it is not for every error committed by the circuit courts, in charging or in refusing to charge the jury, that this court will reverse. It is only after an examination of the whole record, and when it appears that the party complaining has either been injured or may have been injured by an erroneous instruction, that this court will interpose and correct the error.

In the case before us, the fact that the blow was given by the defendant, which caused the death of the deceased, was clearly and distinctly proved. Not a particle of evidence was offered which raised the slightest doubt as to the hand which dealt the fatal blow. It was certainly not a controverted fact, or one about which it was possible for the jury to doubt. Under these circumstances, it cannot be asserted that the jury were misled; and therefore, that the defendant was injured by the instruction. On the contrary, it may with certainty be affirmed, that, in respect to the agent in the homicide, the jury were not and could not have been influenced by the instruction. Such being the case, it would be to defeat, instead of promoting, the true purpose of the law to set aside the verdict for this cause.

4. The court, in behalf of the prisoner, was requested to instruct the jury that "the character of the accused, if proof has been made upon the point, is as much a fact for the consideration of the jury as any other fact in the case; and if the jury should have been satisfied of his guilt, if no proof had been made of the character of the prisoner, yet if it has been proved that the prisoner was an obedient, peaceable, and submissive slave up to the time of his alleged offense, the proof of such a character may, of itself, be sufficient to raise a reasonable doubt of his guilt, of which the jury are the judges."

This charge was refused, and the following instruction was given in lieu of it: "That the character of the prisoner, if proof has been made on the point, was as much a fact for the consideration of the jury as any other fact in the case; but no character, however good, is sufficient to authorize the jury to find the prisoner not guilty, if the proof is otherwise clear and satisfactory that the defendant is guilty as charged."

The refusal of the court to give the former, and the giving of the latter, is next assigned for error

We perceive no objection to the substituted charge of which the prisoner had a right to complain. And the instruction asked for him, we think, was properly withheld.

No precise or definite rule has been laid down by which to determine the weight to which, in prosecutions of this char-

acter, evidence of the good character of the accused is entitled. "Juries," says Sir William Russell, "have been generally told that where the facts proved are sufficient to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the jury with the other facts and circumstances of the case:" 2 Russell on Crimes, 785. This view of the subject is sanctioned by high authority: Whart. Crim. L., sec. 641. And perhaps it is the better course in no case to withdraw from the consideration of the jury the evidence in regard to the good character of the accused. But while the good character of the accused is an ingredient which may be submitted to the jury, it would be going a great way too far to lay it down as a fixed rule that proof of good character is sufficient to raise a reasonable doubt in the minds of the jury when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused. This is the principle contained in the instruction, and for that reason, there was no error in refusing it.

5. The fifth and last exception is, that the motion for a new trial was improperly overruled.

The only question raised under this assignment is whether or not the evidence was sufficient to warrant the finding of the jury. And it is only necessary to say, without going into a minute examination and comparison of the testimony, that it was amply sufficient to sustain the verdict.

Judgment affirmed.

EVIDENCE OF CHARACTER OF DECEASED, when admissible upon question of justification of homicide: See *Dukes v. State*, 71 Am. Dec. 370, note 381, where other cases are collected. Evidence of the character of the deceased is admissible where it is inseparable from the homicide, or a part of the *res gestæ*: *Chase v. State*, 46 Miss. 707, citing the principal case.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE, AND WHEN NOT: See *Dukes v. State*, 71 Am. Dec. 370, note 380; *Teal v. State*, 68 Id. 482, note 486, where other cases are collected. The law accepts no excuse for the destruction of human life on the plea of self-defense, except that the death of the slayer's adversary was necessary, or apparently so, to save his own life or his person from great bodily injury, and that there was imminent danger of such design being accomplished: *Evans v. State*, 44 Miss. 774; *Harris v. State*, 47 Id. 327; *Johnson v. State*, 54 Id. 434; *Scott v. State*, 56 Id. 290, all citing the principal case. Mere fear, or apprehension, or belief, however sincerely entertained by the slayer, will not protect him in acting upon it. The appre-

Apprehension must have been a reasonable one, created by the circumstances surrounding him: *Kendrick v. State*, 55 Id. 446, citing the principal case. And the danger must be present, active, and apparently imminent to create the reasonable belief of danger: *Jefferson v. State*, 52 Id. 771, citing the principal case. A person may believe his life in danger, and that his apprehension is just and reasonable; but if he acts upon it and takes the life of another, he does so at his peril. He is not the final judge: *Evans v. State*, 44 Id. 777, also citing the principal case. The fears of a coward do not justify homicide: *Teal v. State*, 68 Am. Dec. 482.

HOMICIDE TO PREVENT COMMISSION OF CRIME: See *Mitchell v. State*, 68 Am. Dec. 493, note 501, where other cases are collected.

EVIDENCE OF GOOD CHARACTER OF ACCUSED INDICTED FOR HOMICIDE: See *Commonwealth v. Webster*, 52 Am. Dec. 711, note 738, where other cases are collected. Evidence of the good character of the prisoner is not sufficient to authorize the jury to find him not guilty, if the proof is otherwise clear and satisfactory that he is guilty as charged: *Coleman v. State*, 59 Miss. 490, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Wilkinson v. Cook*, 44 Miss. 373, and in *Brad v. State*, Id. 752, to the point that a verdict according to the law and justice of the case will not be disturbed, although the instructions given to the jury be erroneous.

HENDERSON v. THORNTON.

[37 MISSISSIPPI, 448.]

ACCOMMODATION ACCEPTOR OF BILL OF EXCHANGE DOES NOT BECOME CREDITOR OF DRAWER, until he has actually paid the bill.

PARTY TO BE ENTITLED TO ATTACHMENT MUST HAVE PRESENT SUBSISTING DEBT against the person whose property he attaches, and therefore an accommodation acceptor of a bill of exchange is not entitled to an attachment against the drawer until after payment of the bill by him.

COURT OF EQUITY MAY, AT SUIT OF CREDITOR, ANNUL JUDGMENT IN ATTACHMENT rendered against his debtor in favor of a plaintiff who was not a creditor at the time the attachment issued, where the debtor's property is not sufficient to satisfy that and the attachments of other creditors founded on valid debts then subsisting.

BILL in equity. The opinion states the case.

F. M. Rogers and L. E. Houston, for the plaintiffs in error.

R. O. Reynolds, and Dowd and Sykes, for the defendants in error.

By Court, HANDY, J. This bill was filed by the defendants in error, for the purpose of enjoining the payment of a fund in the hands of the sheriff of Monroe, the proceeds of the sale of property levied upon under attachments issued by the plaintiffs in error, and also by the defendants in error, against one Brown, upon which judgments were rendered and executions issued, and the property sold; the object of the bill being to prevent

the payment of the proceeds of the sale to the judgment of the plaintiffs in error, and to have the money applied to the judgments of the defendants in error.

The bill states in substance that the attachment of the plaintiffs in error was issued on the ninth of January, 1858, and levied on the eleventh day of the same month, and that the several attachments of the defendants in error were issued on the twelfth, and levied on that day and on the thirteenth day of the same month, on the same property levied on under the attachment of the plaintiffs in error; and that judgments upon all the attachments were rendered on the twenty-sixth of June, 1858; that executions issued upon all the judgments upon which the money in controversy was made by the sheriff, the amount being insufficient to satisfy the judgment of the plaintiffs in error, to whose execution the sheriff was about to apply the money, whereby the judgments of the defendants would remain wholly unsatisfied, their debtor, Brown, being wholly insolvent. The bill then charges that the attachment and judgment of the plaintiffs in error are void and fraudulent, because it was founded on a bill of exchange drawn by Brown and accepted by the plaintiffs in error, which did not become due until the fifteenth of February, 1858, more than a month after the suing out of their attachment; and that the plaintiffs in error were, at the maturity of the bill, and before, under suspension of payment as commission merchants in New Orleans, and that there was then pending an attachment in chancery for the same debt as that upon which the present attachment of the plaintiffs in error is founded.

To this bill the plaintiffs in error demurred, assigning various grounds of demurrer; which being overruled, they answered, denying the fraud charged, or that there was an attachment pending in chancery for the same cause of action; admitting that their acceptance was not due until the fifteenth of February, 1858, but that being an accommodation acceptance, they became the creditors of the drawer from the date of the acceptance, and upon its being put into circulation; and alleging that they paid the acceptance at its maturity.

Upon the final hearing on the pleadings and proofs, the decree being for the complainants, the case is brought here.

In support of the demurrer, it is contended that, as the bill does not show that the acceptance had not been paid at the time the attachment of the plaintiffs in error was issued, the attachment is not shown to have been invalid, because the accommodation acceptors had the right to pay the bill before maturity,

and thereupon to pursue their remedy against the drawer. But if it be conceded that plaintiffs in error had this right, it cannot be presumed, in the absence of all proof upon the point, that they had paid the bill before maturity; but the presumption would be to the contrary; and this is much strengthened by the fact alleged in the bill, that they were in a state of suspension of payment at and before the maturity of the bill.

Considering the case, then, as it is presented by the bill, answer, and proofs, it appears that the acceptance was not paid by the plaintiffs in error until its maturity, which was more than a month after their attachment was issued; and the question is, Is this such a fraud upon the rights of the defendants in error, who were then creditors of the debtor, and having debts due, as would postpone the right of the former under their attachment to the attachments of the latter? And we are of opinion that it is.

In order to entitle a party to an attachment, it is absolutely necessary that he should have a subsisting debt against the party whose property he attaches. This is required, not only with reference to the rights of the debtor, but it is a matter in which other creditors of the debtor are concerned. The debtor's property is responsible for the debts which he owes at the time of issuing attachments against him; and the creditors then having debts have the right to have it applied to the payment of their debts. It would be absurd to suppose that persons not then creditors had any such right at that time. If, then, a party who is not then a creditor, but is shown only to have become so afterwards, asserts his claim as a present creditor, and issues his attachment against the debtor's property, which is not sufficient to pay that and the attachments of other creditors founded on valid debts then subsisting, it is plain that his claim would be a fraud in law, and operate to the injury of the other creditors, if his attachment was prior in time to those of the other creditors. It would be to deprive them of the right which they had by law to have their debtor's property applied to their debts, by appropriating it to his debt, when he had no legal right to do so.

How, then, is this to be prevented, if such a party issue the first attachment, and before he is in law a debtor? Other attaching creditors might not know of the invalidity of his claim, and it is questionable whether they would be heard to make the defense against his attachment. Their rights cannot be made to depend upon the action of the defendant to be

taken, and which would operate to their benefit and protection. They must therefore have the right to protect themselves by appropriate legal steps, to be taken by them, either by motion in the court where the attachments were pending, and whilst the proceeds of them are under the power of that court, if the evidence necessary to the assertion of their rights be available in that court, or by going into equity: *Walker v. Roberts*, 4 Rich. L. 562. For it is clearly within the power of a court of equity to set aside a fraudulent judgment at the instance of any party who is directly injured by the fraud.

Upon this view, the decree awarding the proceeds of the sale under the attachments to the defendants in error was correct, and it is affirmed.

THE PRINCIPAL CASE IS CITED in *Loughridge v. Bowland*, 52 Misc. 556, to the point that a surety becomes a creditor from the time when he makes payment. In *Howard v. Proskauer*, 57 Id. 249, to the point that a court of equity has jurisdiction to entertain a bill filed by junior creditors, for the purpose of vacating a judgment in favor of a creditor who had no right to make an attachment; and in *Jones v. Moody*, 59 Id. 328, to the point that the ground upon which a junior attaching creditor may procure the vacation of a senior attachment improperly made, is that it operates as a fraud upon him.

JONES v. FINCH.

[37 MISCELLANEOUS, 461.]

OPINIONS OF PERSONS SKILLED IN ANY SCIENCE, TRADE, OR ART ARE ADMISSIBLE IN EVIDENCE upon questions relating to his business or calling. WITNESS SKILLED IN MARKS AND CHARACTERISTICS OF GENUINE BANK BILLS, from long experience and from having studied the modes by which counterfeit bank bills can be detected, is competent to testify as to the genuineness of a bank bill shown to and examined by him, although he does not know the signatures of the president or cashier of the bank.

ACTION to recover the amount of a bank note alleged to be counterfeit. The facts are stated in the opinion.

J. A. Green and F. Anderson, for the plaintiff in error.

T. J. and F. A. R. Wharton, and J. W. Thompson, for the defendant in error.

By Court, HANDY, J. This action was brought by the defendant in error to recover of the plaintiff in error the amount of a bank note of the Bank of Hamburg, South Carolina, which the latter had passed to the former for value, and which was alleged to be counterfeit.

The only question presented in the case is whether the testimony of one Andrew Brown, jun., a witness introduced in behalf of the plaintiff below, was admissible. That witness, on being produced and sworn, was asked by the plaintiff to examine the bank note in question which was shown to him, and to state whether or not it was a counterfeit. On objection by the defendant, the witness was first interrogated as to his capacity, skill, and experience in detecting counterfeit bank notes, and was asked to state whether or not he could detect counterfeit bank notes; to which he replied that he thought he could detect such as were counterfeit; that he had a good deal of experience in detecting counterfeit bank notes, having been in mercantile business, having been frequently called on by the public, having a knowledge of his experience, to determine the genuineness of such notes; and that he thought he was able to determine by inspection whether they were counterfeits or not; that he had studied and learned the system by which counterfeit bank notes, it was believed, could be detected, and that he believed that the means used to determine the question enabled him to determine with certainty in all cases of gross counterfeits. And thereupon the court permitted the question to be put to him as first proposed; and he answered that he had experience in detecting counterfeit bank notes, and had seen many, but never one on the Bank of Hamburg before this; that this was a gross counterfeit, of which fact he had no doubt. Upon being asked whether he knew the signatures of the president and cashier of the bank, he answered that he did not know either of them, and had never seen either of them. He further stated that one of the evidences relied on by him in judging of such notes was that in genuine bills the lines or marks in the fine work were parallel with each other. To the admission of this testimony, the defendant excepted.

The question arising upon this ruling of the court is, not whether a witness who does not know the handwriting of a party from having seen him write, or from having had correspondence with him, but is acquainted with it from having been familiar with his signature, which was treated in the course of business as genuine, as having seen many bank bills which passed as genuine, having the names of the president and cashier upon them, which thereby became well known to the witness, is competent to prove the handwriting of such party; but whether a witness who is skilled in the marks and characteristics of genuine bank bills, from long experience and from

having studied the modes by which counterfeit bank bills can be detected, is competent by such knowledge and skill to testify as to the genuineness of bank bills which are shown to and examined by him. For this is the substance of the testimony admitted in this case.

It is a general rule, that in matters of science, trade, and art, persons of skill may give their opinions in evidence whenever the question is material to the issue. Medical men are allowed to state their opinions about a particular disease, or upon symptoms presented to them; ship-builders about the seaworthiness of a ship; an artist in painting or music about matters belonging to their respective arts, upon the maxim, *Cuilibet in sua arte perito credendum est*: Broom's Leg. Max. 721, 722; 1 Stark. Ev., 7th Am. from 3d Lond. ed., 69. Upon a question of the genuineness of handwriting, it is laid down that a witness who, from habit and practice, has acquired experience and skill in judging of handwriting is a competent witness to testify to his belief that a particular writing is in an imitative style and forged, although he is not acquainted with the handwriting of the person who is alleged to have written the paper: 2 Phill. Ev., Cowen and Hill's Notes, 4th Am. ed., 603; and this has been sanctioned in many cases. Without giving our approbation to the rule to the extent in which it is laid down, it is plain that such persons of skill and experience in judging of handwriting are regarded as experts, and therefore competent to testify in such matters; and this has been held in many cases: *Lyon v. Lyman*, 9 Conn. 55; *Hess v. State*, 5 Ohio, 7 [22 Am. Dec. 767]; *State v. Tutt*, 2 Bailey L. 44, 45 [21 Am. Dec. 508]; *Norman v. Wells*, 17 Wend. 161 et seq.; *Moody v. Rowell*, 17 Pick. 490 [28 Am. Dec. 317].

There appears to be much stronger reason for receiving the opinions of persons who have studied and are skilled in the art of detecting counterfeit bank bills, involving, as it does, a knowledge of the marks and devices used in etching and engraving such instruments, and the system upon which they are executed. We can well conceive that the rules observed by regular artisans in engraving such instruments may be such as to enable one skilled in them to detect such as are counterfeits with reasonable certainty; and indeed, such skill appears to bear a strong analogy to that of the painter, and to be admissible upon the same reason. Besides this, a witness may be acquainted with the peculiarities of engraving and marks from the face of genuine bills of a particular bank, apart from the signatures of the officers,

and thereby be enabled the more certainly to apply his knowledge of the general rules of engraving genuine bills, and to form a correct opinion as to the genuineness of a bill. These means of knowledge upon the subject appear to be amply sufficient to entitle a witness possessed of them to testify upon the question; and this has been held in several cases: *Peterborough v. Jaffray*, 6 N. H. 464; *United States v. Holtzclaw*, 2 Hayw. 379; S. C., 1 Brun. Col. Cas. 31; *Davis v. Mason*, 4 Pick. 156; *Moody v. Rowell*, 17 Id. 490 [28 Am. Dec. 317].

We therefore think that the testimony of the witness was competent.

Judgment affirmed.

EXPERT TESTIMONY: See *People v. Lambert*, 72 Am. Dec. 49; *Doster v. Brown*, 71 Id. 153, note 156; *Joyce v. Maine Ins. Co.*, Id. 538, note 538; *Perkins v. Augusta I. & B. Co.*, Id. 654, note 662; *City Council of Montgomery v. Gilmer*, 70 Id. 562, note 570; *Mulry v. Mohawk V. Ins. Co.*, 66 Id. 380, note 384; *Hammond v. Woodman*, Id. 219, note 228, where this subject is fully considered. In *State v. Brown*, 70 Id. 168, it was decided that a witness is not competent to testify to the genuineness of a bank note who has never seen a genuine note of that bank, but whose knowledge of its notes is derived from fac-similes engraved or descriptions printed in a bank reporter or directory. The principal case is cited in *Caleb v. State*, 39 Miss. 732, to the point that upon questions of science, skill, or trade, and others of the like kind, experts may be permitted to give their opinions in evidence.

BIAS v. COCKRUM.

[37 MISSISSIPPI, 509.]

AUTHORITY OF AGENT TO EXECUTE DEED FOR HIS PRINCIPAL MAY BE PRESUMED from proof that the principal received the purchase-money, and that the vendee went into possession under the deed, which, on its face, purports to have been executed by such agent, and has held such possession for twenty years.

EJECTMENT. The opinion states the case.

T. J. Wharton, and White and Chalmers, for the plaintiff in error.

W. F. Dowd, and Vance and Anderson, for the defendant in error.

By Court, **HANDY, J.** The only question presented in this case is the propriety of the ruling of the court in admitting in evidence the deed offered by the defendant, purporting on its face to be executed by Thomas Hunt, by his attorney in fact, John H. Morgan.

The objection taken in the court below to the admission of

this deed, and here insisted upon, is that the power of attorney which conferred the authority to execute it was not produced, and is not shown to have ever been in existence. For the purpose of obviating this objection, it was first proved that the power of attorney could not be found after diligent search, and was not in the possession of the person who had all the other title papers connected with the title to the land which was conveyed by that deed. It was further in evidence that Morgan—who subsequently to the execution of the deed acted as agent of the plaintiff in having the land sold at sheriff's sale in opposition to the title conveyed by the deed—admitted that the power of attorney was in existence, but that it had never been put on record. But it still further appears, by the certificate of the justices who took the acknowledgment to the deed, that the power of attorney was then exhibited to them; for it states the appearance before them of Thomas Hunt, through his attorney in fact, John H. Morgan, and adds, “his power of attorney appearing valid.” In addition to this, the testimony of the two justices was read, tending in the clearest manner to show that the instrument was produced before them. They both state that they never would have made this recital in the acknowledgment unless the power of attorney had been produced and examined by them; and Lucas, one of them, states, in corroboration of that fact, that he believed that Graham, one of the grantees in the deed, looked to him to see that the conveyance was a valid one; and hence the requirement of the production of the power, and the recital in relation to it.

This testimony very clearly establishes the existence and due execution of the power of attorney at the date of the deed.

But the testimony of William Parks, one of the grantees, is relied on to establish the contrary of this. That witness testified that he was present when the deed was executed, and objection was made to the sufficiency of his authority; and that witness thinks that his authority to sell consisted in a letter from Hunt to him. This testimony and that of Morgan tend somewhat to weaken the testimony offered to show that a valid power of attorney was in existence when the deed was executed, as above stated, but it does not destroy it; and the evidence upon the point appears to preponderate in favor of the existence of a legal power at that time.

But upon another ground, the deed, together with the evidence tending to show its execution under proper authority, was properly admitted in evidence.

It appears that Hunt received the benefit of the purchase-money for which the deed was executed, and that possession of the premises was delivered to the grantees upon the execution of the deed, in the year 1837, and has been held by them, and by those claiming under them, ever since. This was sufficient to warrant the jury in presuming that the deed was executed under valid authority, or that the sale was acquiesced in, so as to conclude Hunt from setting up any title to the land; and in this point of view, the evidence was clearly competent, and fully sustains the verdict: *Hughes v. Wilkinson's Lessee*, 37 Miss. 482. Judgment affirmed.

AGENCY TO ALTER DEED CANNOT BE IMPLIED from acts of the principal in *gate*: *Wallace v. Harstad*, 53 Am. Dec. 603.

WILKINSON v. FLOWERS.

[37 MISSISSIPPI, 579.]

DEFENDANT, TO AVAIL HIMSELF OF DEFENSE OF STATUTE OF LIMITATIONS, MUST SHOW by demurrer, plea, or answer that he intends to rely upon it, or he will be held to have waived that defense; and this is so, although it appear on the face of the bill that the time prescribed as a bar has elapsed.

RIGHT OF MORTGAGEE TO FORECLOSE MORTGAGE IS NOT BARRED BY SAME LAPSE OF TIME that would bar an action on the notes secured by it.

MORTGAGEE'S RIGHT TO FILE HIS BILL OF FORECLOSURE ACCRUES upon the forfeiture of the condition of the mortgage, and the statute of limitations begins to run against such a bill from that time.

MORTGAGEE'S RIGHT TO FILE BILL OF FORECLOSURE IS BARRED by the same lapse of time that would bar an action for the recovery of the possession of the mortgaged premises.

IN EQUITY, PLEA OF STATUTE OF LIMITATIONS IS NOT REQUIRED TO BE FORMAL or technical; a substantial statement of the defense intended to be relied on, which clearly advises the opposite party of its true character, is all that is required. But if the language used is equivocal or subject to two constructions, one of which would present one character of defense and the other a different one, the defendant will not be allowed to avail himself of proof applicable to either.

PAYMENT OF MORTGAGE DEBT IS GOOD DEFENSE TO BILL OF FORECLOSURE, but the defendant in such suit cannot avail himself of the presumption of payment which the statutory bar of the note secured by the mortgage raises in his favor when an action is brought on the note. To avail himself of the defense of payment, he must in his answer plead it and prove it on the hearing.

COURT OF EQUITY WILL NOT PERMIT DEFENDANT TO AVAIL HIMSELF OF STATUTE OF LIMITATIONS, where the delay in bringing the suit was caused by

his own unconscientious conduct in enjoining the collection of the debt during the time of the running of the statute.

PLAINTIFF MAY DISMISS ACTION ON JOINT NOTE AS TO ONE MAKER, even though he be principal, and take judgment against the other.

BILL in equity. The opinion states the case.

John D. Freeman, for the plaintiffs in error.

W. P. Harris, and T. J. and F. A. R. Wharton, for the defendants in error.

By Court, **HARRIS, J.** The defendants, as administrators of Banbury Flowers, deceased, by order of the probate court of Covington county, sold certain lands of the deceased on the fifth of January, 1837, to Archibald G. Wilkinson, for six thousand and fifty-one dollars, and took his three promissory notes, with Duncan Wilkinson and Allen Stewart as joint makers, and executed to him a deed for said land. The first two notes were paid at maturity; but the last note not being paid, suit was instituted in the circuit court of Covington county against all the parties. The suit was dismissed as to Archibald G. Wilkinson, who died pending the action, and judgment was rendered against the other parties on the twenty-third of October, 1840, for two thousand one hundred and thirty-three dollars and twenty-five cents. Execution was issued, and levied on the property of defendant Stewart, on the twenty-fourth of March, 1841. In June, 1841, Stewart filed his bill to enjoin the sale of the said property under said judgment, upon the ground that the said Archibald G. Wilkinson left no property except the land purchased, and for which said note was given. That said land was first liable to pay said note and judgment, and that Duncan Wilkinson was insolvent. The administrators and heirs of A. G. Wilkinson were made parties, and also the complainants in this bill. The injunction was granted, and afterwards dissolved on motion at the December term, 1842, of the chancery court.

Afterwards, on the twenty-eighth of April, 1843, Daniel McFarland, as administrator of A. G. Wilkinson, deceased, with his widow and heirs, and also Duncan Wilkinson and Allen Stewart, said joint makers of said notes, filed their bill and obtained an injunction against said judgment, alleging that said sale by the said administrators of Banbury Flowers was void; that the heirs of Wilkinson had abandoned the land on that account, and had repeatedly proposed to give up the land and

take up said note. On the fifteenth of February, 1851, this injunction was dissolved and bill dismissed.

On the twenty-eighth of April, 1853, the complainants in this bill now pending filed this proceeding, stating that no part of said note or judgment founded on it has ever been paid, claiming the statutory mortgage on said land for which said note was given, and praying a decree for its sale to satisfy said mortgage. The heirs of A. G. Wilkinson and the widow and administrators are made parties.

They answer, denying that there is any such judgment, and insist that the note is barred by the statute of limitations of seven years. But they do not assert title to the land as against the mortgage, by reason of the statutory bar of the right of entry, or of the action of ejectment.

The cause was submitted to the chancellor on final hearing, on bill, answers, exhibits, and proofs, and a decree rendered for complainants; and this writ of error is prosecuted to reverse said decree.

Two grounds of error are insisted on in the brief of counsel for the plaintiffs in error: 1. That complainants' claim was barred by the statute of limitations; and 2. That the judgment obtained by complainants in the circuit court of Covington county on the last note given for the land sought to be subjected to its statutory lien was void, because the suit was dismissed as to the maker, and judgment rendered against the other joint makers.

To understand properly the application of the first error insisted on by counsel, it will be necessary to recur to the answers of the several defendants, to ascertain the pleading and issues presented in the record.

The bill seeks to enforce the statutory mortgage on the land in question, created by purchase at administrator's sale, under an order of the probate court. The answers of the several defendants deny the liability of the land to this statutory lien, because the note, which that lien was intended to secure, is barred by the statute of limitations of seven years. In order to avail himself of the defense of the statute of limitations, a defendant must show, by demurrer, plea, or answer, that he intends to rely upon it, or he will be held to have waived such defense: *Patterson v. Ingraham*, 23 Miss. 87. And this is so, although it appear on the face of the bill that the time prescribed as a bar has elapsed: *Id.* 87.

A party cannot be permitted to make one issue by his plead-

ings, and another by his proof; or to rely upon one defense in his answer, and to avoid liability by proof of another and wholly different defense.

It is now the settled doctrine of this court that the right of the mortgagee to foreclose a mortgage is not barred by the same lapse of time that would bar an action on the notes secured by it: *Nevitt v. Bacon*, 32 Miss. 212 [66 Am. Dec. 609], and cases cited.

Upon the forfeiture of the condition of the mortgage, the mortgagee's right to file his bill of foreclosure accrues, and the statute of limitations commences running against such a bill, from that time.

The period of limitation to a bill of foreclosure is the time fixed by the statute of limitations as barring an action for the recovery of possession of the mortgaged premises: *Nevitt v. Bacon*, 32 Miss. 227 [66 Am. Dec. 609]; *Benson v. Stewart*, 30 Id. 49; 4 Kent's Com. 402; *Jackson v. Wood*, 12 Johns. 252 [7 Am. Dec. 315].

Instead, therefore, of pleading that the note mentioned in the bill was barred by the statute of limitations, the answer should have set up and relied upon the mortgagor's possession, after forfeiture, for a period long enough to bar the right to recover the possession of the mortgaged premises, under the statute of limitations.

The plea of the statute of limitations in equity is not required to be formal or technical. A substantial statement of the defense intended to be relied on so as distinctly and clearly to advise the opposite party of its true character is all that is required in equity practice. Where, however, the language used is equivocal, or subject to two constructions, one of which would present one character of defense and the other a different one, justice to the opposite party will not allow that the defendant should avail himself of proof applicable to either.

In the case before us, it is manifest, both from the language of the several answers and from the position assumed by counsel in their brief filed for plaintiff in error, that they intended to set up the defense that the lien of the statutory mortgage was lost, and ceased when the statute of limitations barred the note. We have already seen that by express adjudication in this court, it is held that "the right of the mortgagee to foreclose his mortgage is not barred by the same lapse of time that would bar an action on the notes secured by it:" *Nevitt v. Bacon*, 32 Miss. 227 [66 Am. Dec. 609], and cases cited. That the note

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The plea of the statute of limitations in equity is not required to be formal or technical. A substantial statement of the defense intended to be relied on so as distinctly and clearly to advise the opposite party of its true character is all that is required in equity practice. Where, however, the language used is equivocal, or subject to two constructions, one of which would present one character of defense and the other a different one, justice to the opposite party will not allow that the defendant should avail himself of proof applicable to either.

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has been barred by the statute of limitations applying to promissory notes does not affect the mortgagee's right to perfect his legal title by proceeding in equity to foreclose the equity of redemption remaining in the mortgagor. And the period prescribed by the statute of limitations as a bar to an action at law to recover possession of the mortgaged property after condition broken is the period within which such proceeding must be instituted.

The promissory note is barred in six years. The right of entry, and the right of action to recover the possession of lands held adversely, is only barred in seven years; and this is the time when the right of foreclosure ceases, and not before. So it is held by this court in *Nevitt v. Bacon*, 32 Miss. 226 [66 Am. Dec. 609], and *Benson v. Stewart*, 30 Id. 49.

The possession of the mortgagor after forfeiture, in the absence of any proof to the contrary, is deemed adverse to the title of the mortgagee. And the failure of the mortgagee to assert his rights against this adverse possession until the statute of limitations bars his right of entry, or his right of action to recover the possession of the premises, or to enforce his lien, raises a presumption, both at law and in equity, that his rights have been satisfied or extinguished, and his mortgage discharged, upon which the statute interposes its bar. The mortgagee having technically the legal title, by virtue of the mortgage, and the mortgagor retaining only the equity of redemption, when a bill is filed to foreclose the equity of redemption, it is in effect a proceeding to assert the legal title of the mortgagee, or to bar the equity of the mortgagor, and to divest him of the possession of the premises. It becomes, therefore, a question of title. The mortgagor may show that the title of the mortgagee has been extinguished in equity by the payment of money due on the mortgage; but as the remedy sought by the mortgagee is on his title by the mortgage, and not on the note, the mortgagor cannot, on a bill of foreclosure, avail himself of the presumption of payment, which the statutory bar of the note raises in his favor, when an action is brought on the note; but he is compelled in his answer to plead the payment in discharge of the mortgage, and to prove it *aliunde* on the hearing, in order to avail himself of that defense.

The statute of limitations proceeds, not so much upon the idea that the debt has been actually extinguished by payment, as upon the denial of all remedy upon the instrument by which the debt is evidenced.

It is only, therefore, in an action on the note that the presumption of payment arising from the statutory bar (applicable to promissory notes) can be indulged.

The act provides that "actions on promissory notes shall be commenced and prosecuted within six years after the right of action shall have accrued." But the remedy in equity on the mortgage is not affected by this statute, and is only barred by the adverse possession of the mortgaged premises for more than seven years from the date of forfeiture, by another section of the act.

To allow the plea that the note is barred by the statute of limitations as a defense to a bill of foreclosure would be to deprive the mortgagee of the greater security afforded by his mortgage lien, and to enable a party who held the possession of the mortgaged premises, even under the mortgage, or not adversely, wholly to defeat its operation without a pretense of title or presumption of payment.

In this case, the record shows that as late as 1851, and dating from April, 1843, these defendants were not claiming the title or possession of the land in controversy.

Even, however, if we were mistaken in this view of the effect of the defendant's plea of the statute of limitations upon the authority of the cases of *Sugg v. Thrasher*, 30 Miss. 135, and *Work v. Harper*, 31 Id. 107 [66 Am. Dec. 549], we should regard the plea of the statute of limitations, if ever so perfectly and formally pleaded, as ineffectual as a defense under the circumstances of this case.

The record shows that no diligence has been wanting on the part of the complainants, in endeavoring to enforce the payment of this debt. Judgment was obtained at the earliest period, and its collection enjoined by Stewart, one of the defendants, and original joint makers of the note sued on. As soon as this injunction was dissolved, these defendants, with others, filed their bill, again enjoining the collection of this debt, and the hands of complainants were tied up thereby until the fifteenth of February, 1851, from the twenty-eighth of April, 1843, until after the statute had interposed its bar.

A court of equity will not permit a party to avail himself of an unconscientious advantage obtained by his own act, and without the fault of his adversary: *Sugg v. Thrasher*, 30 Miss. 135.

The last ground of error insisted on is, that the judgment obtained in the circuit court against Duncan Wilkinson and

Allen Stewart, the joint makers with A. G. Wilkinson of the note sued on, as appears by that record, was void, because the suit was dismissed as to A. G. Wilkinson.

This assignment seems to be based upon the idea that the record of that judgment shows that the defendants against whom judgment was rendered were only sureties. There is nothing, however, in the record showing that they were sureties. Even, however, if this were so, it would not render the judgment void. There is no statute in this state, nor was there at the date of that judgment, even requiring suit against all of several joint makers, where some of them were sureties. The act of February, 1842, Hutch. Code, 819, has reference only to judgments on garnishment; and the act of May, 1837, Hutch. Code, 852, has reference only to indorsers: See *Work v. Harper*, 31 Id. 101 [66 Am. Dec. 549], and cases cited.

A full answer to this assignment, however, even admitting that the judgment had been void, is that this is not a proceeding upon the judgment or note, but wholly independent of either. It is a proceeding upon the mortgage given by statute to foreclose the equity of redemption remaining in the mortgagor.

There is no error, therefore, in the judgment below, and it should be affirmed, which is accordingly hereby ordered.

ENJOINING DEFENDANT FROM PLEADING STATUTE OF LIMITATIONS.—The power of a court of equity to restrain, in a proper case, a defendant from pleading the statute of limitations is recognized by all the authorities: Wood on Limitations of Actions, 484; Blanshard on Limitations of Actions, 164; Bac. Abr., tit. Limitation of Actions, E, 6; Vin. Abr., tit. Limitation, T; 2 Story's Eq. Jur., sec. 1521; *Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 299; *Sugg v. Thrasher*, 30 Miss. 135; *Marsshall v. Minter*, 43 Id. 666; *Doughty v. Doughty*, 10 N. J. Eq. 347; *De Kay v. Darrah*, 14 N. J. L. 288; *Lamb v. Ryan*, 40 N. J. Eq. 67; S. C., 22 Cent. L. J. 154; *Barker v. Millard*, 16 Wend. 572; *Wilkinson v. First National F. I. Co.*, 72 N. Y. 499, 504; *Love v. White*, 4 Hayw. 212; *Union M. L. I. Co. v. Dice*, 14 Fed. Rep. 523; *Anonymous*, 2 Ch. Cas. 217; *Anonymous*, 1 Vern. 74; *Gilbert v. Emerton*, 2 Id. 503; *Bond v. Hopkins*, 1 Sch. & Lef. 413. Indeed, the most usual mode of relief granted by courts of equity in cases where a party has lost his remedy at law by the running of the statute has been by injunction restraining his adversary from setting up the statute as a bar to his action: Wood on Limitations of Actions, 484; *Doughty v. Doughty*, 10 N. J. Eq. 347; *Baker v. Millard*, 16 Wend. 572. Wood says: "Except in those states where a saving is expressly made in favor of parties, where the commencement of an action is enjoined, the fact that an injunction has been procured preventing the bringing of an action upon a certain claim does not save it from the operation of the statute; nor can a court of equity make any order which will prevent the running of the statute during such period, but the remedy of the party is through an application to the court for an injunction to restrain the party from pleading the statute."

In *Barber v. Willard*, *supra*, it was said that prior to the revised statutes in New York, the time that a plaintiff was stayed by injunction from prosecuting his action could not be replied in bar of a plea of the statute of limitations, and that his remedy in such a case was by application to chancery to restrain the defendant from pleading the statute. And Bronson, J., delivering the opinion of the court in that case, said: "The party to a suit in chancery has often applied to that court to restrain the defendant from setting up the statute in an action at law." In delivering the opinion of the court in *Doughty v. Doughty*, 10 N. J. Eq. 349, Williamson, Chancellor, said: "Where this court has, by the solicitation of a suitor invoking the aid of this court for his relief, interfered with the legal rights of another, and impaired his remedy at law, it would seem to be right, and the duty of the court, to protect the party whose rights had been thus interfered with against any undue advantage attempted to be taken by the other party, at whose solicitation the power of this court was called into action. It would be unconscionable for a party to plead the statute of limitations against an adversary, who, at his solicitation, had been enjoined from prosecuting his suit. One acknowledged principle on which courts of equity give relief is to prevent an advantage gained at law from being used against conscience. . . . Nor do I see any necessity of this court's assuming jurisdiction of the whole subject of controversy, and withdrawing the suit from the court of law, to be finally settled here. There is no necessity of doing this in order to give adequate relief. The party obtains all the relief he requires if this court enjoins his adversary from interposing the statute of limitations as a plea in the suit at law. This is a simple mode of relieving the party, and no good reason has been suggested why the court may not exercise its jurisdiction in this way."

WHEN INJUNCTION WILL BE GRANTED.—It is not easy to lay down any definite rule by which to determine when a court of equity will grant an injunction to restrain a defendant from pleading the statute of limitations. Much depends upon the particular circumstances of each case. It may be stated generally that equity will not permit a party to take an unconscientious advantage of his creditor by pleading the statute: 2 Story's Eq. Jur., sec. 1521; *Board of Supervisors of Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 299. Thus it is held that where a person has been deprived of his legal right by unfounded and unconscientious litigation, and is without legal remedy, he may come into a court of equity and enjoin his adversary from availing himself of the advantage which he has obtained by his unjustifiable conduct: *Davis v. Hoops*, 33 Miss. 173. In *Bond v. Hopkins*, 1 Sch. & Lef. 413, it was held that parties obtaining wrongful possession of land, and setting up a false title, under color of instruments finally condemned, during the investigation of which they are protected in their possession by the court, will not be permitted to avail themselves of any length of possession pending the investigation as a bar to the person who ultimately proves to have the right. Fisher, J., delivering the opinion of the court in *Sugg v. Thrasher*, 30 Miss. 144, referring to the defense of the statute of limitations, said: "It is admitted to be a defense at law, but such a defense as a court of equity, acting upon the conscience of the parties, will not permit them to make. Not that the defense of the statute of limitations is of itself unconscientious or immoral, but that it is rendered so by the facts and peculiar circumstances of the case." The class of cases in which a court of equity has most frequently interfered to enjoin the defendant from setting up the statute of limitations as a defense is where the plaintiff has, by the procurement of the defendant, been enjoined from commencing or prosecuting his action until after the bar of the statute

has become complete. A court of equity regards such conduct as unconscientious and unjust, and will not permit a party to reap any benefit from an advantage obtained in that way." Said Sheldon, J., delivering the opinion of the court in *Kelly v. Donlin*, 70 Ill. 381: "Courts of equity interfere in many cases to prevent the bar of the statute of limitations being set up where it would be inequitable or unjust. . . . It would be unconscientious for a party to take advantage of the holding of possession of land for a certain term to defeat another's right thereto, when the latter, by procurement of the former, had been enjoined by a court during all the time from prosecuting and bringing suit for the recovery of the possession." See also *Baylee v. Brown*, 10 Irish Eq. 180; *Pultney v. Warren*, 6 Ves. 73; *Sturt v. Mellish*, 2 Atk. 610; *Sugg v. Thrasher*, 30 Miss. 135; *Marshall v. Minter*, 43 Id. 666; *De Kay v. Darrah*, 14 N. J. L. 288; *Lamb v. Ryan*, 40 N. J. Eq. 67; S. C., 22 Cent. L. J. 154. In *Sugg v. Thrasher*, *supra*, it was held that a debtor at whose instance an injunction has been issued and kept in force for seven years, restraining the collection of a judgment against him, will be enjoined by a court of equity from setting up the statute of limitations as a defense to the collection of the judgment. And in *Pultney v. Warren*, *supra*, it was held that a creditor prevented by the act of the court from obtaining a judgment is to be put in the same situation as if he had obtained it. So in *Marshall v. Minter*, *supra*, it was decided that where a judgment creditor is unjustly restrained by injunction by the act of the debtor until the judgment has been barred by the statute of limitations, though at law an injunction shall not, *proprio vigore*, stop the running of the statute, equity will again furnish a perfect remedy by enjoining the judgment debtor from pleading the statute. In the recent case of *Lamb v. Ryan*, *supra*, the facts were as follows: In 1874 Ryan and Kelly, as executors, sold to the complainant certain land, upon which she paid a deposit. Soon after, in compliance with the terms of the sale, she offered to pay the balance of the price, and made demand for a deed, which they refused. In 1875 she filed her bill in chancery for a specific performance. In 1877 they took a decree against themselves in her favor that they should convey the lot to her, but they took no further steps in the cause, and never tendered her a deed, nor offered to return her deposit. In 1878 she brought an action at law to recover damages for the breach of the contract, and in 1879 they obtained an injunction restraining her from proceeding at law. The executors neglected to pay the interest on a mortgage which was on the premises, and in 1883 the land was sold under foreclosure. Ryan died in 1881. In 1884 the bill for specific performance and all the proceedings in that cause were stricken from the files of the court. In 1884 the complainant, the testator's estate having become insolvent, and Kelly being pecuniarily irresponsible, discontinued her action at law pending in the supreme court, and brought another action at law against the heirs and devisees of Ryan, to recover damages for the breach of the contract to convey, and also her deposit, with interest. She then filed her bill in the court of chancery for an injunction to restrain the defendants from pleading the statute of limitations. It was held that she was entitled to the injunction prayed for, although the defendants had not as yet pleaded the statute. The chancellor, in delivering the opinion, said: "Under the circumstances, the plea would be very inequitable."

WHEN INJUNCTION WILL NOT BE GRANTED.—But a court of equity will not enjoin a defendant from pleading the statute of limitations, except in cases where there are equitable circumstances justifying its interposition, and demanding the exercise of this extraordinary remedy. High says: "Nor will

an injunction be allowed to restrain defendant from pleading the statute of limitations, except in a plain case of fraudulent abuse of the lapse of time. And in the absence of such fraud, and of any contract or stipulation that delay in bringing suit should not prejudice the rights of the parties, an injunction will be refused: "1 High on Injunctions, sec. 79. See also *Bank of Tennessee v. Hill*, 51 Am. Dec. 698, note 700; *Andrae v. Redfield*, 12 Blatchf. 407, affirmed on appeal in 38 U. S. 225; *Walker v. Smith*, 8 Yerg. 238; *Chilton v. Scruggs*, 5 Lea, 308; *Doughty v. Doughty*, 10 N. J. Eq. 347. In the case last cited it was held that as the complainant had lost his legal remedy, not by the action of the court of equity in granting an injunction, but through his own laches and negligence, he was not entitled to an injunction to restrain the defendant from pleading the statute. In *Andrae v. Redfield*, *supra*, it was decided that the power of a court of equity cannot be invoked to annul statutes of limitation by enjoining a defendant from setting up the statute as a bar, simply on the ground that it clearly appears that the cause of action was originally good. In *Chilton v. Scruggs*, *supra*, it was held that a court of chancery will not enjoin a defendant from relying on the defense of the statute of limitations to an action at law on a note, merely upon the ground of a mistake on the part of the plaintiff as to the existence of an injunction inhibiting him from suing upon the note, the mistake not having been superinduced by the debtor.

STATUTE OF LIMITATIONS MUST BE TAKEN ADVANTAGE OF BY DEMURRER, plea, or answer, or it is waived: See *Sturges v. Burton*, 72 Am. Dec. 582, note 589, where other cases are collected.

RIGHT OF MORTGAGEE TO FORECLOSE MORTGAGE IS NOT BARRED BY SAME LAPSE OF TIME that would bar an action on the debt secured by it: *Nevitt v. Bacon*, 66 Am. Dec. 609, note 615, where other cases are collected; *Green v. Gaston*, 56 Miss. 751, citing the principal case.

STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST MORTGAGEE from the time when the right to foreclose accrues, and that period of time which would bar an action at law to recover possession of the mortgaged premises, after condition broken, will bar a bill for foreclosure in equity, unless there be circumstances shown sufficient to take the case out of the bar of the statute: *Nevitt v. Bacon*, 66 Am. Dec. 609, note 615, where other cases are collected.

ENJOINING JUDGMENT UNTIL BAR OF STATUTE OF LIMITATIONS ATTACHES is taking an unconscientious advantage, which the debtor should not be permitted to take: See *Work v. Harper*, 66 Am. Dec. 549, note 552; *Marshall v. Minter*, 43 Miss. 679, citing the principal case.

PLAINTIFF MAY DISMISS SUIT AS TO ONE MAKER OF NOTE, although he be the principal, and take judgment against the other makers: *Pool v. Hill*, 44 Miss. 311; *Moore v. Knox*, 46 Id. 605, both citing the principal case; and see also *Work v. Harper*, 66 Am. Dec. 549; and *Dean v. Duffield*, 58 Id. 108, note 109.

THE PRINCIPAL CASE IS CITED IN *Crump v. Wooten*, 41 Miss. 614, to the point that where different parts of a statute seem to conflict, the statute should receive such a construction, if possible, as will give effect to the whole.

WILLIAMS v. BRICKELL.

[37 MISSISSIPPI, 682.]

SUPERINTENDENT OF HOTEL AT WATERING-PLACE DOES NOT RENDER HIMSELF LIABLE FOR SERVICES OF PHYSICIAN, by sending to a friend in a neighboring town the following telegram, which is by him shown to said physician: "There are many cases of yellow fever at the Well; send out a physician this afternoon, without fail."

CONTENTS OF TELEGRAM CANNOT BE PROVED BY TESTIMONY OF PERSON TO WHOM IT IS SENT, without producing the original, or accounting for its absence.

ERROR WHICH WORKS NO PREJUDICE IS NOT GROUND FOR REVERSAL.

ACTION to recover an open account. The facts are stated in the opinion.

T. J. and F. A. B. Wharton, and D. Shelton, for the plaintiff in error.

Johnston and Shelton, for the defendant in error.

By Court, **HARRIS, J.** The defendant in error commenced his action in the circuit court of Hinds county against the plaintiff in error, to recover an account for two hundred and fifty dollars, for four days' service as a physician at Cooper's Well, in September, 1855, during the prevalence of the yellow fever. The plaintiff in error filed his answer to this complaint, denying its allegations, upon which there was issue and verdict for defendant in error. Bills of exceptions were taken to the admission of certain testimony. A motion for a new trial was made and overruled, and judgment and exceptions to this ruling, and the cause is brought here upon writ of error for revision.

The first ground of error relied on is, that the court erred in permitting secondary evidence of a dispatch sent to Roach at Vicksburg, by the plaintiff in error, without requiring the production of the original, or proof accounting for its absence. This was clearly erroneous, but as there is proof in the record showing the admission by plaintiff in error of the contents of the dispatch, as well as that he sent it, the plaintiff in error could not have been prejudiced by this testimony, and it is not, therefore, good ground of reversal.

It will be unnecessary to examine the various assignments of error growing out of the instructions of the court, as no point is made upon them in the briefs of counsel which we deem it necessary to notice under the view we take of this case. We will therefore confine our attention to the last ground of error, which presents the important question in the cause as to the

liability of the plaintiff in error to the recovery had against him upon the whole evidence in this record.

It is not pretended by the defendant in error that there was any contract, either expressed or implied, beyond the terms of the dispatch appearing in the record; and the admission made to him by plaintiff in error, on his arrival at the Well, that he had sent the dispatch.

That dispatch was in these words: "There are many cases of yellow fever at the Well; send out a physician this afternoon, without fail. Signed, Inman Williams"—and addressed to Major Roach, at Vicksburg.

It appears from this record that Cooper's Well is a public watering-place, resorted to by invalids and others; that the plaintiff in error was, at the time of this dispatch, the agent of the stockholders, and himself a stockholder; that there were many visitors at the Well and boarders in the house kept by plaintiff in error; that the yellow fever appeared there, and spread among the visitors to an alarming extent.

Under these circumstances, we are to consider this dispatch, to ascertain whether it imparts any obligation on the plaintiff in error to become responsible, to the physician who went to their relief, for the many sufferers who might need his services at the Well.

Contracts are not to be lightly inferred. In cases of this description, where men, prompted by motives of humanity alone, seek assistance for a suffering community, or even individuals incapable of helping themselves, if men are to be made responsible for notifying physicians or others of the distressing casualties which demand immediate aid around us almost daily, the claims of pressing calamity may be disregarded for fear that the kind messenger may become the victim of avarice through his generous sympathy.

In the case before us, there is nothing to induce the belief that either the writer of the dispatch, or the person to whom it was addressed, or the defendant in error, understood or intended it as a contract or employment.

It simply announced a fact—there are many cases of yellow fever at the Well—and requested that a physician should be sent out that afternoon, without fail.

Can it be supposed for a moment that the writer intended, by this dispatch, to make the impression upon Major Roach, or upon the physician who should see the dispatch, that the plaintiff in error would pay for the services he might render to the

various boarders and visitors who might have the yellow fever at the Well? Or is it possible that anybody could have mistaken the motive and intent of the writer? He was in the midst of distress, disease, and death, which commanded the sympathy and excited the fears of the whole community. They needed medical skill, and desired some friendly aid from the neighboring city of Vicksburg. What so natural as that a human heart should desire to proclaim their distress and beg for assistance? And upon whom was it more incumbent to give notice of their situation than upon the keeper of the hotel? What less could he have done or said to have avoided the charge now made against him? Suppose that one traveling on our steamboats or railroads should find himself suddenly surrounded by the wounded and dying from one of the distressing casualties incident to these modes of travel, and prompted by duty and necessity he should instantly seek some neighboring physician and others, and summon them to the relief of his distressed fellow-travelers. Because he did not stop to bargain with human beings in a civilized community against personal liability, can it be reasonably inferred that he intended to assume upon himself the whole duty and responsibility which belonged to every citizen in their reach as much as to him? And yet the principle contended for would make him personally liable for all the service that might be rendered by all whom the voice of humanity, speaking through him, had summoned to the scene. Neither reason, public policy, nor public necessity can tolerate such a principle.

A contract, or "agreement upon sufficient consideration," cannot be implied from such conduct.

Let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

ERROR NOT PREJUDICIAL IS NOT GROUND FOR REVERSAL: See *Lakeman v. Pollard*, 69 Am. Dec. 77, note 79; *Baker v. Haldeman*, Id. 430; *Rockhill v. Spraggs*, 68 Id. 607, note 611, where other cases are collected.

BENNETT v. BYRAM & Co.

[38 MISSISSIPPI, 17.]

COMMON CARRIER IS BOUND TO PROCEED WITHOUT DEVIATION from the usual and ordinary course to the place of delivery, under a bill of lading intended as a contract to deliver goods at a certain place.

COMMON CARRIER IS BOUND TO DELIVER GOODS to the consignee in safety at all events, excepting the act of God, the public enemies, and the act or conduct of the owners.

COMMON CARRIER IS BOUND TO MAKE DELIVERY in a reasonable time and with reasonable expedition, when no time of delivery is specified in the contract. But what is a reasonable time must be determined under all the circumstances with a view to the condition of the river, the season of the year, the state of the weather, etc.

OMIGATION OF COMMON CARRIER TO DELIVER goods according to his contract is suspended only during any temporary obstruction. Hence, he is bound, notwithstanding the hinderance of navigation by low water, to deliver the goods in safety as soon as he can by reasonable diligence, after the removal of the unavoidable cause of delay.

OMIGATION OF COMMON CARRIER TO DELIVER, at all events, may, under certain circumstances, be excused; as, if the owner or shipper is induced from any cause to accept the goods short of the place to which they were first intended to be conveyed, the carrier is not only discharged from further liability, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued.

DELIVERY BY COMMON CARRIER IS EXCUSED, and he is discharged from further liability, by an acceptance of the goods voluntarily from a warehouseman, and paying the charges for storage, the party so accepting knowing that the voyage has been abandoned on the account of low water.

THE opinion contains the facts.

L. E. Houston, for the plaintiff in error.

Sale and Phelan, for the defendants in error.

By Court, **HARRIS, J.** The defendants in error brought their action in the circuit court against the plaintiff in error, to recover damages against him as a common carrier by steamboat, for the non-delivery of goods according to contract.

The defendant filed his answer, a general denial of the statement of the cause of action in the complaint; upon which issue was joined, and the jury found a verdict for plaintiff.

It is assigned for error that the jury found contrary to law and evidence; that the court erred in giving the charges asked by plaintiff below, and in refusing charges asked by the defendant below; and lastly, that the court erred in refusing to grant a new trial.

It appears by the record that on the fourth day of June, 1855, the plaintiff in error, as master of the *Eliza No. 2*, a steamboat navigating the Tombigbee river between Mobile and Aberdeen, by bill of lading of that date, contracted to deliver certain goods as a carrier to the defendants in error.

The boat proceeded on her way as far as Gainesville, and was unable to proceed farther on account of the low stage of water. The goods were stored in the warehouse of *McMahon* in June, 1855; the water remaining too low for steamboat navigation for several months thereafter.

On the twenty-first of August, 1855, defendants in error sent an order to McMahon for all the goods except the iron, and received and hauled them to Aberdeen. And afterwards, in January, 1856, the iron was shipped to plaintiffs by the steamboat *Champion*. In this action, it is sought to recover all the expenses which defendants in error incurred after receiving the goods at Gainesville, and indeed after they were left there by the plaintiff in error, as well as a small amount of damage sustained by the rusting of the iron. It is not claimed that any other damage was suffered.

There is no proof of damage by negligence or other improper conduct on the part of plaintiff in error, unless his failure to reach Aberdeen with the goods intrusted to his care is to be so regarded. We lay out of view all that is said in this record and in argument as to the alteration of the bill of lading, and the circumstances under which the bill was signed, as wholly immaterial in this case. The addition of the words "water permitting" did not change the character of the contract, as they are embraced under the general exception, "the act of God:" See Angell on Carriers, secs. 289, 333, and note 2.

The first question for our determination upon the record before us, which it is material to consider, is what was the obligation of the plaintiff in error under this contract as a common carrier.

Admitting that this bill of lading was intended as a contract to deliver the goods to the defendants in error at Aberdeen (which seems not to have been expressed on its face), the carrier was bound first to proceed without deviation from the usual and ordinary course to the place of delivery. He was next bound to deliver the goods to the consignees in safety at all events, excepting the act of God, the public enemies, and the act or conduct of the owners. He was bound to make delivery in a reasonable time and with reasonable expedition, as no time of delivery is specified in the contract. For, says Mr. Angell, in his work on carriers, sec. 283, the duty to deliver, within a reasonable time, is a term ingrafted by legal implication upon a promise or duty to carry generally. See also *Hand v. Baynes*, 4 Whart. 204 [33 Am. Dec. 54], cited in note, and numerous other cases cited. "What would be reasonable time must be determined, under all the circumstances, with a view to the condition of the river, the season of the year, the state of the weather," etc.: See Angell on Carriers, sec. 289, and notes p. 288; *Haas v. Clarke*, 8 T. R. 259; Story on Bailments, sec. 545 a.

Again: the obligation of the carrier to deliver according to his contract is only suspended during any temporary obstruction. It is not thereby avoided: Angell on Carriers, sec. 289, and cases cited. Hence, plaintiff in error was bound, notwithstanding the hinderance of navigation by low water, to deliver defendant's goods in safety as soon as he could by reasonable diligence after the removal of the unavoidable cause of delay: See also *Id.*, sec. 294.

From the obligation to deliver, at all events, the carrier may, under certain circumstances, be excused. And among these, the same learned author mentions the following: "If the owner or shipper is induced from any cause to accept the goods short of the place to which they were first intended to be conveyed, the carrier is not only discharged from liability further, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued:" Angell on Carriers, p. 330, sec. 331.

The acceptance of the goods voluntarily from the warehouseman, knowing that the voyage had been abandoned on account of the low water, and paying these charges for storage, will excuse delivery, and discharge the carrier from further liability therefor: See *Rossiter v. Chester*, 1 Doug. (Mich.) 154; *Parsons v. Hardy*, 14 Wend. 215 [28 Am. Dec. 521]; *Hunt v. Haskell*, 24 Me. 339 [41 Am. Dec. 387]; *Lorent v. Kentring*, 1 Nott & M. 132.

In the case before us, the proof is clear, by the testimony of the parties themselves, that they did accept the goods at Gainesville, paid the freight and storage, and hauled the goods to Aberdeen—all except the iron—long before the plaintiff in error could have complied with his contract, or was bound to have made delivery under the facts in proof. By this acceptance, we have seen that the plaintiff in error was discharged from all subsequent liability or responsibility on account of his contract. Until the goods were so accepted, the carrier was entitled to no compensation before delivery, and was bound for all charges and expenses incurred in the preservation of the goods, and all damage or injury impairing their value while in his possession. After acceptance, he was only entitled to his *pro rata* share of the freight. If he received more than the usual freight from Mobile over Gainesville, he is liable to the defendants in error for such overplus, if they have been compelled to pay it, or have paid it, to him or to his agents or factors, in order to obtain their goods.

After acceptance of the goods at Gainesville by the owners, the carrier was not bound for the expenses of transportation from thence to Aberdeen.

In view of the case here presented, the fourth, fifth, sixth, seventh, eighth, ninth, and tenth instructions were erroneous, and the verdict of the jury for a greater sum than the testimony warranted under the principles above stated.

Let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

LIABILITY OF COMMON CARRIER for deviation from the usual and customary course: *Powers v. Davenport*, 43 Am. Dec. 100; *Hand v. Baynes*, 33 Id. 54; *Guilther v. Myrick*, 66 Id. 316, and notes to these cases.

COMMON CARRIERS ARE LIABLE for any losses occurring from any accident during the transit of the goods, except those arising from the act of God or the public enemies: *Norway P. Co. v. B. & M. Railroad*, 61 Am. Dec. 423, and note 432; *Powell v. Mills*, 64 Id. 158; *N. B. S. & C. T. Co. v. Tiers*, Id. 394; *Cooper v. Berry*, 68 Id. 468; *Fergusson v. Brent*, 71 Id. 582; *Marshall v. American Express Co.*, 73 Id. 381.

COMMON CARRIERS ARE BOUND to make delivery of goods within a reasonable time: *Rathbone v. Neal*, 50 Am. Dec. 579; *Nettles v. S. C. R. R. Co.*, 62 Id. 409, and note 411. The principal case is cited in *Frank & Co. v. Memphis etc. R. R. Co.*, 52 Miss. 572, where it is held that a carrier who is an insurer as to the ultimate delivery of the goods is only bound to deliver within a reasonable time, in the absence of any stipulation as to time, and is only bound to exercise reasonable diligence in procuring transshipment by other agencies.

LOW WATER IS NOT SUCH DANGER of the river as will absolve carrier from his obligation to deliver goods at their destination without unnecessary delay and in good condition: *Hatchett v. Steamer Compromise*, 68 Am. Dec. 782, and note.

WHAT DELIVERY OF GOODS will exonerate common carrier from liability: *Chicago and Rock Island R. R. Co. v. Warren*, 63 Am. Dec. 317; *Moses v. B. & M. R. R.*, 64 Id. 381, and citations in notes to these cases.

WHERE OWNER RECEIVES GOODS at an intermediate point, the carrier is entitled to freight *pro rata*: *Hunt v. Haskell*, 41 Am. Dec. 387; *Crawford v. Williams*, 60 Id. 146, and notes to these cases.

CARRIER'S RISK ENDS if the consignee assumes control of the goods before they have arrived at the place of delivery: *Stone v. Waitt*, 52 Am. Dec. 621.

MONK v. HORNE.

[38 MISSISSIPPI, 100.]

PROBATE COURT HAS POWER TO DETERMINE the regularity and sufficiency of evidence that legal notice of a sale of the decedent's property had been given to the heirs; and in the absence of evidence showing the contrary, its judgment upon the question must be presumed to be right.

RECITALS IN DECREE OF PROBATE COURT that proof was made of publication according to law, and that legal notice of the sale had been given to the heirs, are *prima facie* evidence of due and legal notice.

UNDER DECREE OF PROBATE COURT directing the sale of "the lands and mills belonging to the estate of the deceased," it is competent to sell any real estate or mills belonging to the deceased within the county. The lands need not be more specifically described in the decree.

OBJECTION TO COMPETENCY AND SUFFICIENCY OF EVIDENCE to establish the title of a party under an administrator's sale, in this, that the record does not show that the sale was confirmed, cannot be raised for the first time in the appellate court; for if made in the court below, it might have been obviated by sufficient evidence, and a confirmation shown.

THE facts are stated in the opinion.

W. P. Harris, for the plaintiff in error.

T. J. and F. A. B. Wharton, for the defendant in error.

By Court, *HANDY, J.* This was an action of ejectment brought by the plaintiff in error, as heir at law of his father, Thomas Monk, deceased.

On the trial, the plaintiff showed title in his father, and that he died seised of the premises.

The defendant claimed title under a sale made by the administrator of the father, in virtue of a decree of the court of probates of Wayne county, directing the sale of the lands of the decedent for the payment of his debts, the personalty being insolvent. And in order to establish that title, he offered in evidence what is called an "extract" from the minutes of that court, showing the appointment of Wiley Monk as administrator of the decedent's estate; his petition representing the personal estate to be insolvent, and praying a decree for the sale "of the real estate of which the said Thomas Monk died seised;" an order that notice should be given to all persons interested in the real estate of said decedent to appear at a stated term and show cause why the same should not be sold for the payment of debts, and that publication of that order should be made in a specified newspaper, and a copy of the same posted in three public places in the county at least forty days before the said term; a decree rendered at September term, 1844, referring to the previous order made at July term, 1844, requiring persons interested to show cause against the decree for the sale of "the lands and mills belonging to the estate of Thomas Monk, deceased," reciting that "proof of publication had been made according to law, and that legal notice had been given to the heirs and all persons concerned," etc., and decreeing the sale of the said mills and lands; also a memorandum and certificate showing that a "set of mills (grist and saw), situate on the

Backtanny, and the land thereto belonging," had been sold to John H. Horne for two thousand five hundred dollars.

To the admission of these records the plaintiff objected, on the specific grounds: 1. That it did not appear by the same that the plaintiff had ever had any notice of said proceedings; and 2. Because the land sued for was not mentioned or described in said records. The objection was overruled, and exception taken.

The defendant then offered in evidence the deed made by the administrator to him, reciting the decree of sale—the notice and sale to the defendant—the report of the sale by the administrator to the court, and its confirmation by the court, and particularly describing the lands sold and conveyed as those embraced in the decree of sale; which deed was acknowledged and recorded. To the reading of this the plaintiff objected, because it did not appear from the records of the probate court that the administrator had authority to sell the lands mentioned in the deed. The objection was overruled, and exception taken.

The objections made in both instances to the admission of the evidence offered are substantially the same.

The first is, that the record offered did not sufficiently show that the notice to the parties interested in the real estate of the decedent was published and posted according to law.

It is true that the evidence showing the performance of those acts is not set out in the record. But the decree states that proof was made of the publication according to law, and that legal notice had been given to the heirs. The regularity and sufficiency of this evidence were matters which the court had the power to determine; and in the absence of evidence showing to the contrary, upon well-settled principles, its judgment upon the question must be presumed to be right. Hence it has been held in various cases in this court that such recitals in decrees are at least *prima facie* evidence of due and legal notice: *Commercial Bank of Manchester v. Martin*, 9 Smed. & M. 613; *Cason v. Cason*, 31 Miss. 578; *Root v. McFerrin*, 37 Id. 17 [*ante*, p. 49].

The other objection is that the real estate is not specified in the notice to the heirs and in the decree for the sale. This objection appears to be based on the ground of uncertainty in the description of the real estate.

The decree directs the sale of "the lands and mills belonging to the estate of Thomas Monk, deceased." This was general and comprehensive, and included all the lands and mills belong-

ing to the decedent within the jurisdiction of the court. It was not necessary that the lands should be specifically described in the decree, if the terms of designation employed were sufficiently comprehensive to embrace it; for the general description of the lands includes a part of them. Under the general description in the decree, it was competent to sell any real estate and mills belonging to the deceased within the county; and it is shown by the report of the sale, and the testimony of the defendant, that the lands, which are particularly described in the deed of the administrator as the lands and mills sold under the decree, constituted all the land owned by the decedent in that county.

The assignments of error founded on these objections are therefore not tenable.

Another objection is urged here to the sufficiency of the evidence to establish the title of the defendant under the administrator's sale. It is that the record does not show that the sale was confirmed by the probate court. But this objection cannot avail the plaintiff under the state of case presented by the record.

In the first place, no objection was made to the admission of the evidence of the defendant on this ground. The objections specified to the admission of the evidence, when it was offered, were those above stated; and the ground of the motion for a new trial was in substance the admission of the record of the probate court, for want of notice to the plaintiff as the party interested. He is not to be permitted to allege here another objection against the competency of the evidence; for if this had been made in the court below, it might have been obviated by sufficient evidence. Secondly, it appears that only "extracts" from the records of the probate court were offered in evidence, and if the objection had been made in the court below, the defendant might have shown a confirmation by the probate court, on an application by that court of the proceeds of the sale to the purposes of the administration. And it is quite probable that this was the case; for the deed of the administrator recites a confirmation by the court, and no objection to it on that ground was made by the plaintiff.

Upon the record as presented, the judgment is correct and must be affirmed.

DESCRIPTION OF LAND in an order of sale made by the probate court, when sufficient: *Bloom v. Burdick*, 37 Am. Dec. 299; *Doe v. Henderson*, 48 Id. 216; *Reynolds v. Wilson*, 60 Id. 753.

OBJECTION AS TO ADMISSIBILITY OF EVIDENCE cannot be raised for the first time in the appellate court: *Clark v. State*, 40 Am. Dec. 481; *Parke v. Foster*, 71 Id. 221, and note 225.

CONFIRMATION IS NECESSARY TO GIVE EFFECT AND OPERATION to a sale made under a decree of the probate court: *Learned v. Matthews*, 40 Miss. 227, citing and distinguishing the principal case.

NEW ORLEANS, JACKSON, AND GREAT NORTHERN RAILROAD COMPANY v. ALLBRITTON.

[38 MISSISSIPPI, 242.]

EXPERT EVIDENCE.—Practicing physician is a competent witness as a medical expert, even though he is not a graduate of any medical college or institution, and has no license to practice medicine.

EVIDENCE IS ADMISSIBLE TO PROVE, by way of enhancing damages, the probable expense of the litigation in attorney's fees.

BILL OF EXCEPTIONS IS NOT PROPER MEDIUM through which to certify to the appellate court matters which must necessarily be a part of the original record in the case.

ON MOTION FOR NEW TRIAL, both the judgment and pleadings of the parties must appear in the transcript of the record, independent of the bill of exceptions, to enable the appellate court to determine the error assigned.

IN ACTION AGAINST RAILROAD COMPANY, facts that a collision took place, and that plaintiff was injured, are *prima facie* evidence of negligence and want of skill in the party in charge, and casts the *onus probandi* on the defendant to prove that there has been no disregard of duty, and that the damage resulted from a cause which human care and foresight could not prevent.

IN ACTION AGAINST RAILROAD COMPANY for injuries sustained by a collision, if it is not shown that the engineer in charge was in every respect qualified, and acted with reasonable skill and the utmost caution to prevent such collision, the defendant is liable for all actual and consequential damages proved, and for exemplary damages in the discretion of the jury, provided it is proved that plaintiff received bodily injury, caused by the gross negligence or wanton and willful misconduct of the engineer.

RAILROAD COMPANY HOLDS OUT ITS AGENT as competent and fit to be trusted, and thereby, in effect, warrants his fidelity and good conduct in all matters within the scope of the agency. Hence if such agent is guilty of misconduct, rashness, or negligence, the company will be responsible for any injury resulting therefrom.

PRINCIPAL MUST BE HELD RESPONSIBLE where his employment afforded the agent the means or opportunity which he used while so employed in committing an injury on a third person, and the willful trespass or injury of the agent derived from the authority confided to him by the principal, as a source of power in the exercise of his master's employment, makes the principal responsible,

INSTRUCTION IS ERRONEOUS WHICH DENIES TO JURY the right to consider the direct interest of a witness as party to the suit, in determining the weight to which his testimony was fairly entitled; they being instructed that to disregard his testimony there must be something in his manner or conduct in giving it, or in the testimony of other witnesses, sufficient to satisfy their minds that what the witness stated was false.

THE opinion states the facts, except that one Dr. Simms, who was called for plaintiff, testified that he had been a practicing physician for six years; that he was not a graduate of any medical college or institution, and had no license to practice medicine; that he had attended a course of medical lectures, and had studied the science of medicine three years before beginning the practice thereof. He also testified that about three weeks after plaintiff received the injury from the collision he called to see him; that plaintiff complained of pain in his back and loins, and had a slight cough. Witness was then asked if the injury received by plaintiff, as detailed by him, would produce the pain and cough. Defendant objected, and moved to strike out the evidence of witness and reject him as a medical expert. Motion denied, and defendant excepted. Plaintiff also introduced one Sturges, a practicing lawyer, to prove what would be a reasonable fee in the case at bar. Defendant objected. Objection overruled, and exception taken.

W. P. Harris and J. D. Freeman, for the plaintiff in error.

George L. Potter, for the defendant in error.

By Court, **HARRIS, J.** Under article 86, page 492, of the new code, abolishing the distinction between actions of trespass *vi et armis* and actions of trespass on the case, the defendant here filed his action in the court below to recover of plaintiff in error damages alleged to have been sustained by him, "by a collision of the up and down mail and passenger trains on said road, caused by the gross carelessness, negligence, misconduct, and mismanagement of the servants, agents, and conductors of the said railroad company."

The plaintiff in error filed an answer to this complaint, amounting to a "general denial" of the cause of action therein stated; and upon the issue thus joined, the cause was submitted to the jury. Only two exceptions to the testimony were reserved in the progress of the trial. The first relates to the testimony of Dr. Simms; and the second to the admissibility of evidence to prove, by way of enhancing damages, the probable expense of the litigation in attorney's fees. The ruling of the

court on both these points, is in accordance with well-settled doctrines, not necessary to discuss here. No motion for a new trial appears on this record, except by the bill of exceptions, and we have repeatedly held that a bill of exceptions is not the proper medium through which to certify to this court matters which must necessarily be a part of the original record in the cause, if they exist at all.

The amended record, filed by consent of counsel, furnishes the judgment on the motion for a new trial. But a judgment without a cause of action on which it is based is as insufficient in judicial proceedings, brought to this court for revisal, as a cause of action without a judgment; both must appear in the transcript of the record, being necessary parts thereof, independent of the bill of exceptions, to enable this court to determine the error assigned thereon. The office of a bill of exceptions is to place upon record, by the direction of the court or the law, such extraneous matters as do not necessarily constitute a part of the record in the cause. But the pleadings of the parties, and the judgments of the court thereon, not depending for their preservation on the optionary right to a bill of exceptions, must have a more certain foundation as a record, and higher evidence as such, than the transcript of a bill of exceptions, which is itself but a copy, in this respect, of a supposed matter of record. We cannot therefore notice this motion for a new trial.

This brings us to the consideration of the points presented by the instructions of the court below, which are fully exhibited in the record, together with the whole testimony.

As the three first charges given for the defendant in error are substantially embraced in the propositions reasserted in the fourth instruction, we will consider of them all in examining the fourth instruction given for the plaintiff below. That instruction is as follows: "That in an action against a railroad company, the facts that a collision took place, and that plaintiff was injured, are *prima facie* evidence of negligence or want of skill of the agent in charge, and shifts the burden of proof upon the defendant to show that the engineer was in every respect qualified, and acted with reasonable skill and the utmost caution; and if the disaster was occasioned by the least want of due skill, or of prudence on the part of the engineer in charge of the colliding engine, the defendant is liable, and the jury should find for the plaintiff all actual and consequential damages proved to their satisfaction; and may also find exemplary damages, provided the testimony in the cause shows that the

plaintiff received a bodily injury, and that that injury was caused by the gross negligence or wanton and willful misconduct of the engineer of defendants."

The first proposition here asserted is that a collision is *prima facie* evidence of liability, and casts the *onus probandi* on the defendant.

This rule, in relation to passenger carriers, is correctly stated: "They are bound to the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest, neglect:" 2 Greenl. Ev., sec. 221. "They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the responsibility upon those who can best guard against it:" Shaw, C. J., in *Furwell v. Boston & W. R. R. Co.*, 4 Met. 49 [38 Am. Dec. 839]. Mr. Angell says: "That the *onus probandi* is on the proprietor of the vehicle to establish that there has been no disregard whatever of his duties, and that the damages resulted from a cause which human care and foresight could not prevent, is well settled:" Angell on Carriers, sec. 569; *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346]; *Stokess v. Sallontall*, 13 Pet. 181; *Ware v. Gay*, 11 Pick. 106; *Christie v. Griggs*, 2 Campb. 79; *McKinney v. Niel*, 1 McLean, 540; *Carpus v. London and Brighton Ry Co.*, 5 Q. B. 737.

The second branch of the instruction asserts that if the railroad company failed to show that the engineer was in every respect qualified, and acted with reasonable skill and the utmost caution, to prevent such collision, the company is liable for all actual and consequential damages proved, and for exemplary damages at the discretion of the jury, provided that the testimony in the cause shows that the plaintiff received a bodily injury, and that that injury was caused by the gross negligence or wanton and willful misconduct of the engineer of defendants.

It is insisted on this point: 1. That while the principal is responsible for the torts and negligences of his agent in the course of the agency, or even beyond such general agency when expressly authorized or subsequently adopted by the principal, yet he is never liable for the unauthorized, the willful, or the malicious act or trespass of his agent; and numerous cases and authorities are referred to in support of the limitation here contended for.

And it is urged, in the second place, that notwithstanding the agent still occupies the place and assumes to exercise the duties

of his agency, yet if in doing so he transgress the order of his principal, or by his willful and malicious abuse of the power derived from his agency inflict injury on the public or third persons, the principal is not responsible, without proof of some guilty omission or participation in such wrongful conduct. And for this, respectable authority is not wanting.

It is lastly insisted, in relation to this instruction, that, at all events, exemplary or punitive damages against the principal, for such willful and malicious conduct, cannot, upon any just principles, be visited upon the principal, who is not only wholly innocent of intentional wrong, but usually the greatest sufferer by such wrongful acts.

In the case before us, as it often happens in legal science, it will be found much more difficult to reconcile the apparently conflicting opinions of courts—swayed by the peculiar hardships of the individual cases they have been called to decide—with each other, or with true principles, than to ascertain the true principles themselves, which should guide us.

The foundation of the rule on this subject is that the agent is but the instrument. That one having authority over the actions of another—who for his own benefit places him in a condition to injure others by the exercise of the powers conferred—shall be responsible for the abuse of that power by his agent, as if it were the act of himself, whether such abuse be the result of negligence or willfulness.

The true principle is thus stated by Judge Story in his work on agency, secs. 451, 452: "In the next place, as to the liability of principals to third persons for the acts of their agents, this topic may be dismissed in a few words; for the whole doctrine turns upon the obvious maxim that he who acts by another acts by himself"—quoting the maxim of the Roman code, 4 Inst., tit. 5, *Qui facit per alium, facit per se*, and citing numerous elementary writers for this foundation of the principle.

He then comes, in section 452, to treat of the "liability of the principal to third persons for the misfeasances, negligences, and torts of his agent." "It is a general doctrine of the law," says he, "that although the principal is not ordinarily liable (for he sometimes is), in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has co-operated in those acts or misdeeds, yet he is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and

omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases, the rule applies, *respondet superior*, and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

Mr. Angell, in his lucid work on carriers, treating of passenger carriers, and of "their duties in respect to the character and competency of their servants," says: "The general rule as to all persons professing to exercise any trade or employment, for all persons indifferently, is that they are bound for a due application, on the part of their servants, of the necessary attention, art, and skill." He applies the doctrine to stage-drivers, engineers, and switch-tenders on railroads, and says: "They must be such as are, in the first place, fully competent, and in the next, careful and trustworthy in their general character:" See sec. 540.

And in section 541, speaking of the duty of proprietors of public lines of conveyance to employ temperate and discreet agents, he gives, as a reason for the observance of this precaution, "for if the driver of a stage-coach or the engineer of a railroad is under any circumstances guilty of misconduct, rashness, or negligence, the proprietors will be responsible for any injury resulting therefrom."

In section 546 the same author says: "In short, when the carriage is by railroad, the company impliedly warrants the road to be in good traveling order, and fit for use; then again, supposing the condition of the road itself to be ever so good, the conductor of the train is guilty of misconduct by endeavoring to drive his train to a certain station before it is reached by a counter-train; for if the conductors of both trains are governed by the same idea, the passengers are exposed to the dangers of a collision."

The rule may be thus stated: In all cases where it appears that the employment of the principal afforded the agent the means or opportunity, which he used while so employed, in committing an injury on a third person, the principal must be

held responsible. The willful trespass or injury of the agent, derived from the authority confided to him by the principal as a source of power in the exercise of his master's employment, will make the principal responsible. And this, upon the reason that he who employs and confides, should be the loser rather than a stranger—a rule of justice entirely consonant with the maxim of the Roman law already cited.

These doctrines are very fully considered, the cases reviewed, and all the objections to these instructions fully answered in this court, in the case of *Vicksburg etc. R. R. Co. v. Patton*, 31 Miss. 198 [66 Am. Dec. 552].

The case of *McCoy v. McKowen*, 26 Miss. 487 [59 Am. Dec. 264], and the case *McManus v. Crickett*, 1 East, 106, on which it was based, are clearly distinguishable from the case before the court now, as well as the case of *Vicksburg etc. R. R. Co. v. Patton*, *supra*.

They were both cases having no relation to the great principle of public policy and convenience, and indeed, of public necessity, which gave rise to the rules regulating the responsibility of carriers. These rules have been extended by the courts wisely, we think, to meet the enhanced facilities, dangers, and necessities growing out of the new modes of travel invented by the age.

It is no answer to the soundness of these views to say that the doctrine of *respondet superior*, thus extended, involves the innocent with the guilty. The books abound not only with strong cases of recovery against common carriers wholly without fault on their part, sanctioned by the most learned judges and enlightened courts; but their inflexibility in maintaining and even extending these salutary rules of law without bending to popular sympathies, or yielding to the hardships of a particular case, has been the subject of just admiration and compliment: See 2 Kent's Com., 9th ed., 812, 813.

Indeed, even criminal responsibility attaches to the principal for the acts of the agent in some cases, where the principal is wholly ignorant of the act of the agent: See 1 Whart. Crim. L., sec. 153. We think there is no error, therefore, in the first, second, third, and fourth instructions given for plaintiff below.

The last instruction asked for the plaintiff was asked as an explanation of a modification of one of the defendant's instructions. That the force of this instruction may be seen more clearly, we state them in their order in point of time.

The defendant below asked the following instruction, which

was refused: "The testimony of the plaintiff by himself may be entirely disregarded by the jury, if they think proper."

In lieu of this instruction, the court, without request, gave the following as a modification of the above charge so refused: "The jury are the proper judges of the testimony of all the witnesses in the case. It is their right and province to weigh and consider that of the plaintiff; and if, after weighing and considering it, with all the other facts and circumstances of the case, as shown from the evidence, they should believe that it is untrue, they may so treat it and entirely disregard it."

As an explanation of the foregoing last instruction, the court, at the instance of plaintiff, gave the following: "To authorize the jury to disbelieve, and consequently to disregard, the testimony of a witness, there must be something in his manner or conduct in giving in his testimony, or in the testimony of the other witnesses in the cause, sufficient to satisfy the minds of the jury that what the witness has stated is false."

Under these instructions, the jury were wholly denied the right to consider of the "interest" of the witness as a party to the suit in determining the weight to which his testimony was fairly entitled. They were confined to his "manner and conduct in giving in his testimony," and to "the testimony of the other witnesses in the cause sufficient to satisfy their minds that what he stated was false," and could not consider of his direct interest in the event of the suit, which the statute gives them the right and makes it their duty to consider.

It is said, in answer to this objection to the ruling of the court below, that this instruction could not have been prejudicial to the defendant below, as the testimony of plaintiff below was wholly immaterial and might have been omitted. We cannot so regard it. On one of the main points in issue (the injury to the plaintiff below) from the very nature of the inquiry, it was the most important testimony in the cause, and we cannot say what influence it may have exerted on the jury in producing the verdict shown in this record.

For this error, let the judgment be reversed, cause remanded, and a *venire de novo* awarded.

HANDY, J., being a stockholder in the railroad company, did not sit in this cause.

EXPERT TESTIMONY AS TO MEDICAL QUESTION: See extended note on this question appended to *Hammond v. Woodman*, 66 Am. Dec. 234, where the principal case is cited with others of like import. See also note to *Ashworth v. Kittridge*, 59 Id. 180.

BILL OF EXCEPTIONS, what should contain: *State v. Somerville*, 38 Am. Dec. 248; *Johnson's Ex'x v. Jennings's Adm'r*, 60 Id. 323, and note 330; *Love v. Moynahan*, 63 Id. 306; *Sanford v. Howard*, 68 Id. 101.

ERROR WILL NOT BE NOTICED unless apparent from the record: *Sanford v. Howard*, 68 Am. Dec. 101, and note 106. Whatever lawfully belongs to the record cannot be inserted in or certified to the appellate court through the medium of a bill of exceptions. Where no portion of the original record is to be found outside of the bill of exceptions, the appellate court has no right to examine into the assignments of error in the case: *Smith v. Calcote*, 41 Miss. 657. Thus the instructions given and refused, and motion for a new trial, with the decision of the court thereon, must be stated in the record. The objections and exceptions thereto must be presented by the bill of exceptions, as must also the facts bearing on these questions: *Fisher v. Fisher*, 43 Id. 214, both citing the principal case.

BURDEN OF PROOF IS ON PASSENGER CARRIERS to show an absence of negligence, and that the damage or injury occurred by some cause which human care and foresight could not prevent: *Farish v. Reigle*, 62 Am. Dec. 666, and note 679-687; and a *prima facie* case of negligence is made out against the carrier when the passenger proves that he was such, and that an accident and injury occurred to him. This presumption must be rebutted by the carrier to exonerate him: *Galena etc. R. R. Co. v. Yarwood*, 65 Id. 682, and note 690.

LIABILITY OF PASSENGER CARRIERS FOR NEGLIGENCE: See *Farish v. Reigle*, 62 Am. Dec. 666; *Galena etc. R. R. Co. v. Yarwood*, *supra*; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Norton v. Western R. R. Corporation*, 69 Id. 623, and numerous references in notes to these cases.

RAILROAD COMPANY IS LIABLE in exemplary damages for an injury caused by the negligence of its servants: *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 686, and note 589; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Murray v. South Carolina R. R. Co.*, 70 Id. 219. The principal case is cited on this point in *M. & O. R. R. Co. v. Whitfield*, 44 Miss. 491.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BRYAN v. MILLER.

[28 MISSOURI, 52.]

WHERE CONFESSION OF JUDGMENT is by statute required to state concisely the facts out of which the indebtedness arose, and to show that the amount thereof is justly due or to become due, a statement that confession is based upon a note given in consideration of goods, wares, and merchandise sold by plaintiff to defendant before the date of the note, but not stating any time of sale, or any specific kinds of goods, is insufficient as against other creditors.

JUDGMENT IS BINDING UPON PARTIES THERETO if entered upon a confession, accompanied by a defective statement.

AMENDMENT OF DEFECTS IN STATEMENT ACCOMPANYING CONFESSION of judgment might be made, but not so as to interfere with the rights of other judgment creditors who may have attached in the mean time.

THE facts are stated in the opinion.

Hovey, for the plaintiffs in error.

Parsons and Edmunds, for the respondents.

By Court, RICHARDSON, J. The plaintiffs, as subsequent judgment creditors of Murray, filed their motion to set aside a judgment confessed by Murray to the defendants, on the ground that the statement was not in compliance with the statute. The statement is as follows: "The defendant Ephraim D. Murray states that he is justly indebted to the above-named plaintiffs [Miller and others] the sum of sixty-eight dollars, and he asks the court here to render a judgment against him therefor in favor of said plaintiffs. He states that on the twenty-seventh day of August, 1857, he executed his promissory note to the said plaintiff for the sum of sixty-six dollars and

sixty-five cents, due four months after the date thereof; that said note was given for goods, wares, and merchandise sold by the plaintiffs to defendant before that date, and that no part of said note has been paid, but the whole of the principal and interest therein is still justly due and owing."

The statute requires that a statement in writing must be made, signed by the defendant, and verified by affidavit to the following effect: "1. It must state the amount for which the judgment may be rendered and authorize the entering of judgment thereon; 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due:" Rev. Code 1855, p. 1282, sec. 22. This provision of our law was taken literally from the New York code, and though the inferior courts in that state differed for a while as to its construction, its meaning is now well settled. It is said that the policy in requiring verified statements to state concisely the facts out of which the indebtedness arose, is to point the other creditors of the debtor to the precise transaction out of which the confessed indebtedness arose, to enable them to inquire into its truth, and to confine the defendant and the creditors to whom the judgment is confessed to the particular matter set forth as the foundation of the judgment, in case its good faith should be attacked: *Gandal v. Finn*, 23 Barb. 652. And in *Chappel v. Chappel*, 12 N. Y. 215 [64 Am. Dec. 496], it was observed by the court of appeals that "the object was to improve the condition of other creditors by compelling the parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose, thus enabling them, by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment than was possible under the old system." The same views are reasserted in a recent case decided in the same court less than a year ago: *Dunham v. Waterman*, 17 N. Y. 9 [72 Am. Dec. 406]. We think these views are just and reasonable, and though their practical application in some cases may seem harsh, they will tend generally to prevent fraud and save the records of the courts from becoming instruments of injustice. It has been held that a general allegation that the debt was "for goods sold and delivered," or on account "of a promissory note," of a certain date and amount, or "on a note given for goods sold and delivered," or "on a note given on a settlement of accounts," is insufficient.

In this statement the consideration is stated to be goods, wares, and merchandise, sold by the plaintiffs to the defendant before the date of the note, but no time is stated, nor the particular kind of property sold included in the general description of "goods, wares, and merchandise." If the statement required to be made is to be of any service to the other creditors of the judgment debtor, it ought to state—where the indebtedness is for property sold—when and what kind of property was sold, the price or the aggregate of the purchase, and the amount of payments, if any. It is not necessary that the statement should be as particular as a bill of particulars, but it ought to be sufficiently particular to afford a clew to a creditor, if there is fraud and he desires to investigate it.

The judgment will be valid between the parties, though it may not be so as to other judgment creditors, and the statement may be amended, but not so as to interfere with the rights of other judgment creditors which may have attached in the mean time.

Judge Scott concurring, the judgment overruling the plaintiffs' motion will be reversed, and the cause remanded.

NAPTON, J., absent.

JUDGMENT BY CONFESSION must concisely show the facts out of which the indebtedness arose: *Chappel v. Chappel*, 64 Am. Dec. 496, and note 501. A statement showing simply that it arose on a promissory note is insufficient: *Id.* On this point the principal case is cited in *Hew v. Dorscheimer*, 31 Mo. 350. It is also cited in *Southern Bank of Missouri v. McDonald*, 46 Id. 33, as authority upon the question of the right of a judgment creditor to appear in the case, in which the judgment is confessed, to move to set aside such confessed judgment for irregularity, but in the principal case no such question was raised. However, in the latter case, and in the other cases cited in 46 Id. 350, motions to set aside the confessed judgments were made by judgment creditors other than those in whose favor the judgments had been confessed. In *Southern Bank of Missouri v. McDonald*, Id. 33, the court hold that such motion can be made by such other judgment creditors.

YOUNG v. SMITH.

[28 MISSOURI, 65.]

UNDER FORCIBLE ENTRY AND UNLAWFUL DETAINER ACT, which provides that "a demand in writing is only necessary when any person wrongfully and without force shall obtain and continue in possession of the lands of another," no demand in writing is necessary to entitle a plaintiff to recover, if his tenant hold over after the expiration of his term.

IF TENANT ATTORNS TO PERSON from whom he did not originally lease, the presumption is strong against him that the person to whom he attorned

is the successor in interest of his former landlord, and he will be bound by his attornment unless it was procured from him by the fraud or misrepresentation of the person to whom he has thus attorned.

TENANT CANNOT DISPUTE TITLE of his landlord to the leased premises.

NO NOTICE TO QUIT, NOR DEMAND OF POSSESSION, is necessary when the term of the lease is to end on a certain day, because both parties are apprised of the determination of the lease. The landlord may proceed at once to recover the leased premises.

NOTICE MAY BE DISPENSED WITH by the agreement between the lessor and lessee. This is a principle of common law, and is applicable to all tenancies.

ACTION for unlawful detainer. Defendant leased certain premises from Lewis, and afterwards agreed in writing with plaintiff that he would deliver to plaintiff possession of the premises at a time certain. Failing in this, plaintiff commenced this action, had judgment, and the case is now up on a writ of error. The other facts are stated in the opinion.

Ewing, attorney-general, for the plaintiff in error.

Ryland and Son, for the defendant in error.

By Court, SCOTT, J. The third section of the act concerning forcible entry and detainer describes two modes by which the wrong of an unlawful detainer may be committed. To entitle a plaintiff to remedy for an unlawful detainer in the manner first mentioned in that section, no demand in writing is necessary. If the tenant holds over the premises after the termination of the time for which they were demised or let to him, he is subject to a suit for an unlawful detainer, without any demand in writing for the delivery of the possession. This is evident from the words of the statute. A demand in writing is only necessary when any person wrongfully, and without force, shall obtain and continue in possession of the lands of another.

We do not see what a lease from Lewis to the defendant has to do with the case, as he acknowledged the plaintiff to be his landlord. There was no evidence given or offered that Lewis denied the right of the plaintiff. On the contrary, the circumstances raise a strong presumption of a conveyance or sale of the premises by Lewis to Young, the plaintiff, and there is no pretense that there was any misrepresentation on the part of the plaintiff. There is no foundation in the evidence for the application of the law relative to the attornment by a tenant to a stranger. So far from it, the case furnishes an instance in which the rule is applicable that a tenant cannot dispute the

title of his landlord: *Hall v. Butler*, 2 P. & D. 374; S. C., 10 Ad. & EL 204.

When the term of a lease is to end on a precise day there is no occasion for a notice to quit previously to bringing an ejectment, because both parties are equally apprised of the determination of the term: *Cobb v. Stokes*, 8 East, 358. In this case the lease was for a less term than one year: *Messenger v. Armstrong*, 4 T. R. 54; *Rolleston v. Smith*, Id. 162. Although the thirteenth section of the act concerning landlord and tenant, among other tenancies, allows a tenancy for less than one year to be terminated by a month's notice to quit, yet the section immediately succeeding enacts that no notice to quit shall be necessary to or from a tenant whose term is to end at a certain time, or where, by agreement, notice is dispensed with. This is nothing but a principle of common law, and it is applicable to all tenancies, without regard to their duration.

The doctrine of the case of *Reed v. Holland*, 11 Mo. 605, and others like it, that he only who has been in possession of land can maintain a suit for a forcible entry and detainer, or of unlawful detainer, was changed at the last revision: Rev. Code 1855, p. 794, sec. 36; and now heirs, devisees, grantees, and assigns may have these remedies.

Judgment affirmed.

RICHARDSON, J., concurred.

NAPTON, J., absent.

TENANT CANNOT DISPUTE LANDLORD'S TITLE—EXCEPTION TO RULE: *Camley v. Stanfield*, 60 Am. Dec. 219, and note 222. This rule does not extend beyond the particular title under which the tenant went into possession: *Bettison v. Budd*, 65 Id. 442; does not apply to tenant who has purchased at tax sale the landlord's title to the premises occupied by tenant: Id. 452, notes; *Winston v. President etc.*, 61 Id. 540, and note 541.

TENANT CAN DISPUTE LANDLORD'S TITLE, WHEN: See note, subd. 2, *Daniels v. Brown*, 69 Am. Dec. 510, where the authorities are collected and cited; see note to *Bettison v. Budd*, 65 Id. 452. The principal case is cited in *Penix v. Kuester*, 41 Mo. 451, as to tenants disputing their landlord's title, where this subject is discussed at considerable length; also in *Gillett v. Mathews*, 45 Id. 509.

TENANT HOLDING OVER AFTER EXPIRATION OF TERM is not entitled to notice to quit: See note to *Daniels v. Brown*, 69 Am. Dec. 508, where the authorities are collected. This principle is affirmed in *Alexander v. Westcott*, 37 Mo. 113, citing the principal case.

AS TO NECESSITY OF DEMAND, the principal case is affirmed in *Silvey v. Sumner*, 61 Mo. 257.

WINSTON v. TAYLOR.

[28 MISSOURI, 82.]

SAFETY OF STOCK IS NOT INSURED where one receives it of another to pasture at a certain price per head per month, but under such contract the agister is only bound to take ordinary and reasonable care, and is only responsible for ordinary negligence.

EVIDENCE OF DEFENSE NOT PLEADED cannot be given at trial.

ONE CANNOT ABSOLVE HIMSELF FROM LIABILITY ON CONTRACT by retiring from the firm that is a party to such contract, unless the other contracting party consents to his release.

WHERE FIRM RECEIVES STOCK TO BE PASTURED for an indefinite time, if one of the firm retires he may absolve himself from further liability upon the contract by requiring owner to remove his stock. If owner permitted stock to remain after a reasonable time, it would operate as a release to retiring partner. Such defense, however, ought to be clearly made out.

BURDEN OF PROOF DOES NOT BY ANY RULE always rest on same party. Sometimes it depends on the form of the action and the stage of the cause at which the action arises. In trover, plaintiff may rely on a demand and refusal to deliver the property, and defendant will be put on his defense; but in *assumpsit*, or action on the case, founded on negligence, plaintiff must make out a *prima facie* case as he charges it.

INSTRUCTIONS NOT WITHIN ISSUES made by the pleadings should not be given by the trial court to the jury.

DEMURRER IS PROPERLY SUSTAINED when complaint shows action is based upon judgment of court of another state, and that jurisdiction over defendant was acquired by the publication of summons.

The facts are sufficiently stated in the opinion.

Edwards and Ewing, for the plaintiffs in error.

Parsons, for the defendant in error.

By Court, RICHARDSON, J. The defendant and his partners, who kept a ranch in California, received of the plaintiffs in September, 1850, eight horses and seven mules to be herded on their ranch, for which the plaintiffs were to pay three dollars per head each month. By this contract the defendant did not insure the safety of the stock, but was only bound to take ordinary and reasonable care of it, and was only responsible for ordinary negligence: Story on Bailments, sec. 443.

The amended petition on which the action was tried, after setting out the contract and its legal effect, averred that though the plaintiffs demanded the horses and mules of the defendant, only six of the horses and four of the mules were delivered, and that the others were lost by reason of the negligence and improper care of defendant. The defendant admitted that some of the horses and mules were lost, but denied that they

have been demanded by the plaintiffs, or that they were lost by the carelessness or negligence of the defendant. The only issue tendered by the answer was whether the property was lost by the defendant's negligence. No new matter was introduced or relied on, and there was nothing to warrant the admission of Claybrook's testimony, or the giving of the fifth and sixth instructions asked by the defendant. The defense made for the first time at the trial amounted to a release, which was inadmissible, if for no other reason than because it was not set up in the answer.

The defendant could not absolve himself, without the consent of the plaintiffs, from the liability the contract imposed on him and his partners by retiring from the firm: *Holden v. McFaul*, 21 Mo. 215. But as the stock was not placed in the defendant's custody for any definite time, and the plaintiffs could have removed it at their pleasure, the defendant, on the other hand, could have required the plaintiffs to take it away by giving them reasonable notice; and, in my opinion, if Taylor had advised them that he intended to give up the business and leave the country, and had requested them to remove their stock, there would be no hardship in holding, if they permitted it to remain after the expiration of a reasonable time within which they could have taken it away, that they looked to the other partners to take care of their property, and discharged him from the contract. Such a defense, however, ought to be clearly made out, not only as to the request, but that reasonable time was given after notice for the removal of the stock, and that a cause of action against him had not already accrued.

There is, perhaps, no absolute rule for determining, in every case, upon whom the burden of proof rests, whether upon the bailor to establish the negligence by which the property was lost, or upon the bailee to show that the loss has been without any neglect on his part. Sometimes it depends on the form of the action and upon the stage of the cause at which the question arises. In an action of trover, the plaintiffs may rely on a demand and refusal of the property, and thus put the opposite party on the defense; but in an action of *assumpsit*, or an action on the case founded on negligence, the plaintiff must make out a *prima facie* case as he charges it; for it is a general common-law principle that every person is presumed to do his duty until the contrary is shown: Story on Bailments, secs. 213, 278, 410, 454. It is also said that when the thing

bailed is lost or injured, the bailee is bound to account for such loss or injury; but when this is done, the proof of negligence or want of due care is thrown on the bailor: 1 Parsons on Cont. 606. In this case, however, the question did not arise, and there was no propriety in giving the instructions asked by either party on the subject, for the pleadings admitted the bailment and the loss of the property, and both parties gave evidence bearing on the subject of negligence, and as the whole case was before the jury, the only question to be decided was whether the loss resulted from the want of ordinary care and attention.

The demurrer was properly sustained to the original petition; for as the defendant never appeared to the suit in California, the notice by publication was insufficient to authorize an action in this state on the record of the judgment: *Stonestreet v. Shannon*, 1 Mo. 375; *Salles v. Hay*, 3 Id. 84; *Smith v. Ross*, 7 Id. 463.

Judge Scott concurring, the judgment will be reversed, and the cause remanded.

NAPTON, J., absent.

AGISTER OF STOCK IS NOT INSURER OF THEIR SAFETY, and is liable for their loss only on proof of negligence or want of proper care: *Rey v. Toney*, 69 Am. Dec. 444; *Cecil v. Preuch*, 16 Id. 171.

BURDEN OF PROOF, where party seeks to avoid statute of limitation: *Shannon v. White*, 60 Am. Dec. 115, and note 121. In trespass: *Linnard v. Crossland*, Id. 213.

JUDGMENT OF SISTER STATE.—When the complaint shows service of summons was made by publication only, a demurrer thereto should be sustained: See principal case. Same, entered on unauthorized appearance of attorney: *Baltzell v. Nosler*, 63 Am. Dec. 466, and note 479. An answer which denies that defendant was not at the time of service a resident of the state where judgment was rendered, and that he was not served, and that he had no notice of the pendency of the action, and that he had no agent or attorney authorized to appear for him, is not sufficient; he should show that he did not appear, or that he did not voluntarily submit his case to the court for adjudication: Id. 471.

DEFENSES NOT PLEADED in answer cannot be proved at trial: *Cowden v. Cairns*, 28 Mo. 474; *Cloud v. Irie*, Id. 578.

INSTRUCTIONS HAVING NO FOUNDATION in evidence should be refused: *Johnson v. Jennings*, 60 Am. Dec. 323; *Brown v. Illius*, 71 Id. 49; *Chicago etc. R. R. Co. v. George*, Id. 239; *Abbott v. Gatch*, Id. 635, and note 645; *Hosley v. Brooks*, Id. 252; *Andre v. Bodman*, Id. 623, and note 635; *Benson v. Atwood*, Id. 611; *Crommelin v. Thiess*, 70 Id. 505, and note under that case on same page: *Coughlin v. People*, 68 Id. 541, and note 543; *Conger v. Dean*, 66 Id. 93, and note thereunder 96; *Treat v. Lord*, Id. 299, and note 305; *Penobscot R. R. Co. v. White*, Id. 257; *Heirn v. McCaughan*, Id. 589, and note 603; *McIntyre v. Kline*, 64 Id. 163, and note 165.

ADAMS v. DARBY.

[28 MISSOURI, 162.]

DRAWER OF BILL IS OBLIGATED TO PAY BILL, if the drawee refuses to pay it when requested to do so, at its maturity, and due notice has been given of its dishonor. If the bill is not properly presented when due, the drawer will be discharged, unless the holder is excused from presenting it.

HOLDER OF BILL WILL BE EXCUSED FROM PRESENTING IT, if drawer had no right to draw, or had no funds in hands of drawee, or had no expectation of funds there, or the drawee was not obliged to accept, or the drawer, having funds in the drawee's hands during the currency of the bill, had withdrawn the same before the bill matured.

PRESUMPTION IS DRAWER OF BILL HAD FUNDS IN HANDS OF DRAWER, until the contrary is shown.

DRAWER OF BILL IS ENTITLED to have it duly presented, and notice of dishonor given, if there was a fluctuating balance between himself and the drawee in the course of their dealings, or he had reasonable expectations that it would be paid, or the drawee had promised to accept it, or had habitually done so without regard to the state of their accounts.

DAMAGE IS PRESUMED TO HAVE BEEN DONE the drawer, if proper presentment is not made and notice of dishonor given.

PRESENTMENT IS EXCUSED ONLY WHEN DRAWER HAD NO FUNDS in hands of drawee continuously from the drawing of the bill until after it fell due, and this under such circumstances as to establish that he had no right to expect drawee or any other person to accept or pay.

PRESENTMENT IS NOT EXCUSED because drawer removed funds from hands of drawee after the bill should have been presented.

DIRECTION IN BILL TO CHARGE TO PARTICULAR FUND does not give holder an interest in the property out of which the fund arises.

IT IS INCUMBERT ON HOLDER TO PRESENT BILL, and he neglects to do so at a proper time, he will lose not only his remedy on the bill, but also on the consideration or debt in respect of which it was given or transferred.

THE facts are fully stated in the opinion.

Knox and Kellogg, for the appellants.

Bland and Coleman, for the respondent.

By Court, **RICHARDSON, J.** It is averred in the petition that in the fourth of September, 1856, the plaintiff deposited with the defendants, who are bankers, two thousand two hundred and ninety-six dollars, under the agreement that he could withdraw the same at his pleasure; that he drew checks against the deposit prior to the eighteenth of October, to the amount of one thousand six hundred and thirty-five dollars, leaving a balance of about six hundred and sixty dollars; and that afterwards, on the seventeenth of December, he drew a check for said balance, which the defendants refused to pay. The defendants in their amended answer did not deny any of the allegations in the petition, but set up as a counter-claim that

the plaintiff, on the fifteenth of April, 1856, drew a bill of exchange on Oglesby & Macauley, of New Orleans, and therein and thereby directed them, sixty days after the date thereof, to pay to the order of Kirkman & Luke, nine hundred and twenty-five dollars, for value received, and to charge the same to account of fifteen barrels of castor-oil per Pennsylvania; that Kirkman & Luke indorsed the bill for the accommodation of the plaintiff, who sold it to the defendants on the sixteenth of April, and that they were then the holders thereof. They further alleged that before the date of the check described in the petition (December 17, 1856), the plaintiff received of Oglesby & Macauley all the proceeds of the castor-oil, amounting to more than nine hundred and twenty-five dollars, and before the commencement of the suit (February 18, 1857), received of Oglesby & Macauley all money and the proceeds of all property which they ever had received for him, or on his account. Wherefore they claimed that the plaintiff was indebted to them nine hundred and twenty-five dollars for money had and received, being the proceeds of said castor-oil.

The plaintiff demurred to the counter-claim, for the reasons that it did not appear that the bill had ever been presented for acceptance or payment, or that the drawees had ever refused to pay it, or that notice had been given of its dishonor, or that the plaintiff withdrew the proceeds of the oil before the maturity of the bill; also because no excuse was shown why the bill had not been presented, either for the reason that the plaintiff had no right to expect it would be paid when he drew it, or that he had no funds in the hands of the drawees during the currency of the bill; and finally, for the reason that the defendants did not show that they were entitled to the proceeds of the oil. The demurrer was sustained, and judgment given for the plaintiff.

The engagement of the drawer of a bill is only conditional that he will pay if the drawee be requested at the maturity of the bill to pay and refuses to do so, and due notice of its dishonor be given; and generally he will be discharged from all liability, unless the bill is properly presented on the day it ought to be. The holder, however, will be excused from making any presentment, if it is shown that the drawer had no right to draw, or had no funds in the hands of the drawee, or expectation of funds, or there was no obligation of the drawee to accept, or the drawer having funds in his hands of the drawee during the currency of the bill, had withdrawn the same

before the bill matured. But until the contrary is shown, it will be presumed that the drawer had effects in the hands of the drawee, and had a right to draw upon him for the amount: Ch. Bills, 435. And even though the drawer had no funds or property in the hands of the drawee, he is entitled to have the bill duly presented, and to receive due notice of its dishonor, if there was a fluctuating balance between them in the course of their dealings, or he had a reasonable expectation when he drew the bill that it would be paid, or if the drawee was under a promise to accept, or had been in the habit of accepting, without regard to the state of their accounts: *Dickens v. Beal*, 10 Pet. 572. If proper presentment is not made, or if made and the bill is dishonored, and proper notice is not given, it is a presumption of law that the drawer has been damaged; and Chitty says that "almost the only allowed proof of the negative is that of the entire want of effects in the hands of the drawee continually, from the time of drawing the bill until and after the day it fell due, and this under such circumstances as to establish that the drawer had no right to expect the drawee, or any other person, to accept or pay." No case has been found in the books which decides that the holder of a bill is excused for having failed to present it at the proper time, because the drawer withdrew his funds after the time that the bill ought to have been presented.

These principles are well established; and though instances occur every day in which parties are allowed to take advantage of an omission by a person who would charge them, when it is obvious that no injury has been sustained by reason of the omission, it would be unwise, and would shake the stability of the law to multiply exceptions in order to save hard cases. If the plaintiff had withdrawn the proceeds of the oil before the bill matured, the defendants could easily have said so, but the form of the averment implies an admission that the funds were not taken away until after the bill became due. The answer says that before the drawing of the check, which was in December, the money was withdrawn, but the bill was due long before, in June, and nothing is stated to repel the inference that the bill would have been paid if it had been presented.

The direction at the foot of the bill to charge to a particular account gave the defendants no interest in the oil: *Kimball v. Donald*, 20 Mo. 577 [64 Am. Dec. 209]; but their only right was to the bill. And whenever it is incumbent on the holder of a bill to present it at the proper time, and he neglects to do

so, he will lose, not only his remedy upon the bill, but also upon the consideration or debt in respect of which it was given or transferred: Ch. Bills, 354; Story on Promissory Notes, sec. 203.

Judge Scott concurring, the judgment will be affirmed.

WAIVER OF NOTICE IS EQUIVALENT to an admission of due presentment: *Matthey v. Gully*, 60 Am. Dec. 595, and note 596.

NOTICE OF DISHONOR IS SUFFICIENT if it can be inferred therefrom that due presentment was made and the instrument dishonored: *Stoughton v. Swan*, 60 Am. Dec. 605.

DIRECTION TO PAY BILL OF EXCHANGE OUT OF PARTICULAR FUND does not operate as an equitable assignment of that fund until it has been accepted, nor does it change the character of the instrument: *Kimball v. Donald*, 64 Am. Dec. 209, and note 213.

WANT OF DILIGENCE IN PRESENTMENT of a check cannot be taken advantage of by the drawer, if, when he drew it, he had no funds in the hands of the drawee, or if he has made no provisions to meet the check, or, if he has, after issuing the check, withdrawn his funds from the hands of the drawee: *Moody v. Mack*, 43 Mo. 212, citing the principal case. This equitable rule might be applied to an indorser; if he should sell a draft for value, and before presentation he should obtain a duplicate and sell that for an additional sum, or should draw the money, he would be chargeable, although there was a want of diligence in presenting the bill by his first indorsee. A fraudulent transaction will not be presumed: *Id.*

HIGHT v. ROBBINS.

[28 MISSOURI, 168.]

MASTER HAS POWER TO EMPLOY PILOT on a river steamboat, within the duration of his own term of service, for a longer term than one trip.

ACTION against owner of a steamboat, navigating the upper Mississippi river, to recover the wages of a pilot. The master employed plaintiff to serve as pilot for five months, with an understanding that at times when his own boat was idle the pilot should go on any other boat that would employ him, and his wages earned on such other boats should be credited on his wages on the master's boat. At the expiration of the term the pilot and master settled, and this action is brought to recover the balance due the pilot. The master served on the boat from the time he employed the pilot until after the five months expired. There was also evidence that he had employed other pilots for the boat with the approval of the owner.

Henderson and Thomas, and Hayden, for the appellant.
Grover, for the respondent.

By Court, RICHARDSON, J. This case presents the question whether the master of a steamboat, within the duration of his own term of service, has the power to employ a pilot so as to bind the owner for a longer time than one trip of the boat.

The law is well settled that the master of a ship has the right to employ the mariners and appoint his subordinate officers either in the home or foreign port; but this power, it seems, is limited to a single voyage, and though it is conceded that masters of steamboats have the same power, it is contended that it is limited to one trip of the boat. The ordinary voyage of a ship requires several weeks, and most generally several months, whilst some of the boats that navigate the waters of this state make daily, some of them semi-weekly and weekly, trips; and few of them are out of port more than twenty days at a time. And arguing from analogy, as the master of a ship employs those under him for a voyage, it would be reasonable to say that the master of a steamboat has the incidental authority to employ his subordinates for an ordinary boating season. The popularity and success of a boat depend very much on the character of its officers. Customers are drawn to a boat by the known skill and reputation of its officers, and public confidence would never be given to a vessel that changed its clerks, pilots, or engineers every trip; and the best officers—who can command constant employment and permanent situations—would not take a berth on a boat which they were liable to lose at the end of every trip.

The clerk ought to know the trade and customers of the boat; the pilot should not only be familiar with the river, but ought to know the habits of the boat and the particular manner of landing it; and an engineer is certainly safer and more competent when attending to machinery that he is accustomed to manage. It is not only for the interest of the public, but it is better for the owners that this power should exist; for if the pilots or other officers could only be employed by the master for a single trip or voyage, they would seek indemnity for the risk of losing their places by an increased compensation.

The power of a master in the temporary service of the owners, and engaged himself for only a single trip, would not reach to the extent of contracting with a pilot for a greater length of time than his own term of service; but we think his authority co-extensive with the duration of his right to command the vessel, extended to the employment of a pilot for the whole of one boating season; and this power is deducible from the nature

of his employment and the necessities of commerce. This may be stated as the general rule, subject of course to the right of the owner to man his vessel as he thinks proper, and to such exceptions as the particular circumstances of each case may create, and the express or implied incidents to the trade in which the boat may be engaged. This implied authority may be affected by the usages or customs of a particular trade, but in the absence of evidence of any modification of the general rule by well-established custom, we are not called on to say how far it would yield if a boat should change owners, or be destroyed, or be compelled to lay up or go into a different trade or river.

It is said that there is no evidence in the record of any usage on the subject, and that we ought therefore to apply by analogy the law governing ships on the high seas to steamboats on the western rivers; but every one knows that many rules govern the navigation of the ocean that are inapplicable to the navigation of our rivers. Law is founded on reason, and springing out of the necessities of society and the wants of commerce, it adapts itself with a wise flexibility to the new developments of trade and the increased and diversified interests of communities. An expanding and enriching commerce has grown up on the great rivers that bound and intersect this state, which has become an important and leading interest that ought not to be crippled by arbitrary rules that belong to another system, but it should be fostered by wise laws suggested by experience and adapted to its character and peculiar wants. We cannot shut our eyes to the leading principles which, as individuals, we know govern it and have grown up with it; but the courts will take notice of such general customs as are founded in reason and enlightened public policy.

It appears from the evidence that the plaintiff was employed by the master as pilot of the defendant's boat for the term of five months, and that the master continued in command of the boat until after the expiration of the term for which the pilot was engaged; and as we think the master had authority to make the contract so as to bind the defendant, the instruction which the court gave that forced the plaintiff to take a nonsuit was erroneous.

The judgment will be reversed, and the cause remanded, the other judges concurring.

MAGWIRE v. MARKS.

[26 MISSOURI, 128.]

SATISFACTION OF JUDGMENT MAY BE CANCELED when it appears that the execution upon which it is indorsed was satisfied out of property not belonging to the defendant, and that he has had to refund the money he received to the owner, and has made reparation to him for the injury caused by the wrongful seizure.

DOCTRINE OF CAVEAT EMPTOR IN RELATION to purchasers at execution sales discussed.

THE facts are sufficiently stated in the opinion.

Krum and Harding, and W. F. Wood, for the plaintiff in error.

Field, for the defendant in error.

By Court, NAPTON, J. The twentieth section of the eighth article of the act to regulate proceedings in justices' courts is an important modification of the law governing execution sales. Occurring as it does in the act which relates to justices' courts only, it may be presumed that it was only designed to apply to executions issuing from these inferior tribunals, yet its language is broad enough to include all kind of executions; and it is not very apparent what motive could have induced the legislature to introduce the remedy therein provided in one class of executions more than in another. The doctrine of *caveat emptor* is not abolished by this section, so far as purchasers at execution sales are concerned; but a consequence which has been drawn from this doctrine, exempting execution debtors from all responsibility to purchasers at such sales when their title has failed, is distinctly repudiated. The principle might have been applied with great propriety to all executions, from whatever quarter they might emanate, and it seems to be the result of oversight or accident that the provision is found where it is, instead of in the act regulating executions generally. The case of *Heath v. Daggett*, 21 Mo. 69, is not reconcilable with a strict application of the maxim of *caveat emptor* to execution sales. The return of the sheriff was in that case not held to estop him from showing that the property levied on and sold was not in fact the property of the defendant in the execution; and therein the decision was totally at variance with the case of *Curtis v. Bennett*, 11 Humph. 295, which has been cited in behalf of the defendant in this case.

The facts of this case are, that the plaintiff has received no

benefit from anything which has been done under this execution, and the defendant has received no injury; that the plaintiff has obtained no money, and the defendant has lost none; that both parties are *in statu quo* before the levy. To hold that the plaintiff is estopped from showing this because of the return of the sheriff, which shows the collection of nearly all the money called for by the execution, can only be justified by regarding the plaintiff as bound by the levy and sales which he ordered, however fruitless their results might prove. This would have the appearance of inflicting a penalty upon him for taking a course which he is expressly authorized to take by the statute, and for the consequences of which to others he has become responsible under the provisions of the statute, by giving ample bond and security. These consequences the plaintiff has already submitted to in the shape of damages recovered in another suit, and to add to them the loss of his claim against the defendant in the execution, not one cent of which has been paid, would certainly be a harsh construction of the law. Undoubtedly, the rule of *caveat emptor* is the settled rule in this state, so far as purchasers under execution are concerned; and if the rule, by its implication, necessarily embraces the defendant in the execution, the plaintiff, and the sheriff, as was held in the cases of *Vattier v. Lytle*, 6 Ohio, 482, and *Perry v. Williams*, Dudley (S. C.), 46, the application of *Magwire* to have the return corrected could not be granted. But the section of the statute to which we have referred shows the intention of the legislature not to extend the operation of this principle to the defendant in the execution, and taken in connection with the decision in *Heath v. Daggett*, 21 Mo. 69, seems to warrant the conclusion to which, with some hesitation, we have arrived in the face of respectable authorities to the contrary. We shall permit the sheriff's return to be amended.

The judgment is reversed, and the cause remanded.

The other judges concurred.

THE PRINCIPAL CASE IS CITED IN *McLeon v. Martin*, 45 Mo. 396; *Valle v. Fleming*, 29 Id. 163. In those cases, the doctrine of *caveat emptor* is discussed in its bearing upon purchasers at execution sales.

STEAMBOAT KEYSTONE v. MOIES.

[28 MISSOURI, 242.]

DUTY OF COMMON CARRIERS TOWARDS GOODS which the consignee refuses to receive is to act, so far as he can, consistent with his right to collect his freight and preserve his lien therefor, in the interests of the consignor. If he acts as any prudent man would with his own affairs, he will be held harmless.

CUSTOM WHICH DISREGARDS THIS RULE would be unreasonable and unjust to shippers, and they are not bound by it.

DEFENDANT shipped certain castings on the steamboat Keystone, from St. Louis to Wyandotte, Kansas. The consignees refused to receive them or pay the freight. The steamer returned them to the shipping point, and this action was brought to recover freight both ways, and charges for extra trouble. Plaintiff relies on a custom of steamboats on the rivers of Missouri for his right to do as it did.

Smith and Sedgwick, for the appellants.

A. M. and S. H. Gardner, for the respondents.

By Court, NAPTON, J. The custom of returning goods to the place of shipment, where the consignee at the place of delivery has refused to receive them, may be a very reasonable one when the freight is very small in proportion to the value of the goods. In such cases, the consignor would probably prefer that the boat should bring them back, and a custom to this effect, as it would be entirely consistent with the consignor's interest, would only show that the carrier, in acting as the agent of the consignor, had discharged his duty, and acted as the consignor himself would have done if he had been in a position to be consulted. But where the goods are of a perishable nature, or where the freight constitutes a large proportion of their value at the place of consignment, such a custom would hardly obtain, and would certainly be very burdensome to shippers. If a cargo of West India fruit is brought up from New Orleans, and the consignee here refuses to receive it, would the carrier be justified in taking it back to New Orleans at the hazard of losing it entirely, and with a certainty that it would be worth greatly less there than here? If a cargo of salt or iron is shipped from here to a point high up the Missouri, shall the boat, in the event that the consignor refuses to receive it, bring it back to St. Louis, where the freight up and down will exceed the full value of iron or salt here? Such a custom, if it exists, would seem to be unreasonable, and could not therefore be

acquiesced in by shippers, since it could be productive of no benefit to them. There is no doubt that the boat has a lien on the goods for its freight, and is not bound to deliver them up to the consignee until the freight is paid: 3 Kent's Com. 220; *Schooner Volunteer*, 1 Sumn. 551; Abbott on Shipping, 37. If the consignee refuses to receive the goods, the carrier may deposit them at the place of delivery in a warehouse, with directions to be delivered to the owner upon payment of charges: *Fisk v. Newton*, 1 Denio, 45 [43 Am. Dec. 649]; *Mayell v. Potter*, 2 Johns. Cas. 371. In England the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order the wharfinger not to part with them until the freight and other charges are paid: Abbott on Shipping, 378.

The principle upon which the carrier's duty is based, in the event of a refusal of the consignee to receive the goods, is simply to regard himself as an agent for the owners, and as such, invested with authority to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to himself for his freight and charges. What he ought to do in a given case will manifestly depend upon the circumstances, and there can be, and ought to be, no universal rule in course to be followed in all cases. If, acting as agent for the owners, he pursues such course as men of ordinary prudence would follow, he is protected by the law, whatever may be the result. In the case of *Arthur v. Schooner Cassius*, 1 Story, 97, Judge Story considered it the duty of the master to land the freight at the port of destination, and if the consignees refused to receive it, "to place it in the hands of some trustworthy person for the security of his lien for freight, and subject thereto for the benefit and account of the owners." "No right," he adds, "even under such circumstances, could exist on the part of the master to sell the cargo, unless it was perishable, and might otherwise have been lost, or have perished." If there is no warehouse, or no responsible or trustworthy person, at the place of consignment, as may happen at some landings on our rivers, the carrier would certainly not be authorized to leave them on the shore exposed to injuries by the weather or by depredations: *Ostrander v. Brown*, 15 Johns. 39 [8 Am. Dec. 211]. In such an event, he is thrown upon the rule to which we have already adverted, of taking such course as will secure his freight, and at the same time advance, as far as ordinary prudence can

foresee, the interest of the shipper; and it is quite manifest that if the master lands the goods at the nearest or most convenient port above or below the point of consignment where warehouses and responsible agents may be found, and apprises the owners of what has been done, he has discharged his duty, and will not be held responsible for losses, if any should happen. This would undoubtedly be the law where the cost of transportation entered very largely into the value of the goods at the place of their destination, and where, as a matter of course, the property would be more valuable to the owner at that place than at the place from which they were shipped. If the goods consisted of a package of jewels, or of a box of costly articles, whose value was great in proportion to the cost of transportation, it might reasonably be inferred that the refusal of the particular consignee to whom they were forwarded to receive them would justify, and perhaps require, the carrier to return them to the consignor. Such course would be justified on the same principle which would authorize the carrier to leave goods of another description in a warehouse at the port of destination, or the port nearest thereto where warehouses could be found. In both cases it is consulting the apparent interest of the owners, and at the same time securing the claim of the carrier for his freight.

We shall send the case back to be tried on these principles. The verdict was rendered under an instruction confining the jury to the mere question of a custom, about which the evidence was very slight and unsatisfactory. The steamboat masters who were examined spoke of a general practice of returning freight to the owners here where the consignees refused to receive it, but did not explain the character of the goods so returned and received and paid for. They may have been misled by one or two incidents falling under their observation, and supposed that a case here and there, perhaps perfectly consistent with our understanding of the law, constituted a custom universally applicable under all circumstances. We doubt the existence of a custom so totally destructive of the interests of shippers as was imagined to be established in this case. With the concurrence of all the judges, the case is remanded.

CUSTOM OF COMMON CARRIERS in particular river may be shown by parol evidence, but to constitute a good custom, it must be shown to have been uniform, and so generally known and acquiesced in and so well established,

that the parties must be presumed to have contracted with reference to it: *Steele v. McTyer*, 70 Am. Dec. 522, and note under that case 523.

CUSTOM AMONG COMMON CARRIERS is irrelevant and inadmissible in evidence on the question of liability for loss of goods, when it tends only to show an excuse for delay in their delivery: *Cox v. Peterson*, 68 Am. Dec. 145.

WHEN CUSTOM ADMISSIBLE IN EVIDENCE: See note under *Cox v. Peterson*, 68 Am. Dec. 145.

THE PRINCIPAL CASE IS CITED AND FOLLOWED IN *Cramer v. Express Co.*, 56 Mo. 529, on the question of duty of common carriers in respect to freight not received by consignee.

WILEY v. HOLMES.

[28 MISSOURI, 236.]

JUDGMENT AGAINST ONE PARTNER on a firm obligation in one state does not bar an action against another partner in another state for the same debt, where both debtors have voluntarily removed themselves out of the state where the debt was incurred, prior to the commencement of proceedings against them.

THE facts are stated in the opinion.

Todd, for the plaintiff in error.

Knox and Kellogg, for the defendants in error.

By Court, SCOTT, J. This suit is founded on a promissory note executed to the plaintiffs by the style of L. M. Wiley & Co., payable in New York. The note was signed "Bloomer & Holmes"—a partnership composed of the defendant and Robert Bloomer—and dated "New York, March 19, 1849." The defense was, that by the laws of New York the note was a joint one, and that by the law of that state a judgment recovered against one of the parties thereto was a merger and extinguishment of the contract as to the other party, and that afterwards no action could be maintained upon it; that in an action on the said note in the state of Louisiana a judgment was rendered against the said Robert Bloomer, one of the parties thereto, and therefore the contract was extinguished as to both of them. There was a judgment for the plaintiffs.

It is well settled that the law of the place of the contract governs as to its nature, obligation, and interpretation, and also that it determines whether a contract is joint and several, or several. It is equally clear that by the common law, which is shown to be the law of New York on this subject, the note sued on is a joint one, and that if a creditor sues one debtor

on a joint contract and recovers against him a judgment, the debt is merged in the judgment, and in case the judgment is not satisfied, the creditor cannot afterwards sue the other joint debtor or debtors. This was on the ground that the creditor by his own voluntary act had extinguished his debt as to one of the debtors, and a debt being extinguished as to one was extinguished as to all of the debtors. At common law, in case of joint contracts, the joint debtors who could not be served with process might be prosecuted to outlawry; in which event, the estate of the outlaw falling into the hands of the crown, the creditor might, by an application to the king, obtain satisfaction of his demand.

At common law, if one of the joint debtors died, although no suit at law could be sustained against the representatives of the deceased debtor, the cause of action surviving only against the living debtor, yet courts of equity in such cases afforded relief, and permitted the debt to be recovered against the representatives of the deceased debtor. And so far was this carried that the representatives of the deceased debtor might be sued before any action was instituted against the survivor: *Winter v. Innes*, 4 Myl. & Cr. 109. This must have been on the ground that the creditor in no wise contributed to the act which deprived him of his action at law; and it shows that although technically at law the remedy against one of the joint debtors may be lost, yet where the creditor does no act himself which affects his remedy, that in equity and substantial justice it will be preserved for him. Thus it would seem that, at the common law, a destruction or taking away of the right of recovery in a suit at law against one of the joint debtors does not destroy all remedy against him and the surviving debtor, but that the right of recovery would remain as to all, but yet to be pursued in different forums. We are of the opinion, too, that it may be inferred from this that the act by which the creditor's remedy is to be merged or extinguished must be a voluntary one on his part. It must be his own act. If the act of God will not extinguish the creditor's right of recovery on a joint demand, can the debtor by his own act do it? Can two debtors create a joint debt in a state where the common law prevails, and afterwards, even before the debt becomes due, by removing into different states, prevent a recovery of it, by setting up the defense, to an action against one of them, when only one can be sued, that by the law of the place where the contract was made it was a joint one, and the action on it must be joint, and against

both or it must fail. To a plea containing such a defense, would it not be a good replication that the defendant, by his own act, in removing to another state had prevented the institution of a joint action?

We do not see how the international law as to the nature, obligation, and interpretation of contracts can affect this question. If both the debtors had remained in New York, and whilst there the debt had been merged as to one of them by the voluntary act of the creditor, there might be some propriety in holding that this action could not be maintained. But as the defendants by their own act prevented the law of the place from operating on the contract, on what principle can they claim the benefit of that law which they have abandoned and renounced? It is the law of New York, and of all other civilized states, that a debtor shall not, by his own voluntary, unauthorized act, defeat the claims of his creditors. It is no answer to this to say that the parties must have contracted in contemplation of the possibility of such a state of things, and should therefore have provided against it. Parties may contract in reference to a foreign law, or they may agree that the law of their residence shall accompany them wherever they may go; but no system of jurisprudence would adopt it as a rule for the interpretation of contracts, in the absence of all stipulations on the subject, that the parties, at the time of making the contract in a place of which they were citizens, had in contemplation the possibility of their becoming residents of another country. Parties may be supposed to contract in reference to what may transpire or what may take place under the laws of the country to which they are subject, but they can never be supposed to have in mind a state of things inimical to the interests of the state of which they are members.

The case of *Dennett v. Chick*, 2 Greenl. 191 [11 Am. Dec. 59], is a stronger one than that under consideration. There Chick, one of two joint debtors in a promissory note, was sued in the state of Maine. The other joint debtor, Ham, not being found in that state, and having no domicile there, no service was made on him. The defendant Chick appeared and pleaded in bar a judgment recovered in an action on the same note in the state of New Hampshire against Ham, Chick having no domicile or property in that state. A writ of execution was issued on the judgment, and returned unsatisfied. To this plea there was a demurrer, and the demurrer was sustained. The case of *Candee v. Clark*, 2 Mich. 255, is unlike that before us. We

understand that in this case the state of Michigan gave the law of the contract. The merger was caused by a recovery in the state of Ohio against one of the parties. Afterwards suit was brought against both of them in the state of Michigan. If this case decides that under the circumstances no action could be maintained on the note against either of the parties, it is opposed to the above-cited case from Greenleaf. But if it only intended to maintain that a recovery could not be had in the action as brought on the ground of variance between the declaration and evidence (both parties being sued when the cause of action was merged as to one of them), we have nothing to say against it, as, by the common law, it was clear that the action could not be maintained. In that case, too, it appears that the joint debtors were residents of the state of Michigan, and that at the time of the commencement of the action in the state of Ohio against Brown, one of the joint debtors, he was a citizen of the state of Michigan. So in fact the joint debtors by their act had not compelled the creditors to sue in the state of Ohio, and the suit was voluntary on their part, not induced by the conduct of the debtors.

Our statute, by making all joint contracts joint or several, and allowing a suit against one or more of the joint debtors, has altered the doctrine of the common law in relation to actions on joint demands.

The other judges concur; affirmed.

LEX FORI GOVERNS REMEDY upon personal contracts: *Kanaga v. Taylor*, 70 Am. Dec. 65, and note 66, collecting prior cases. As to chattel mortgages, see note, subd. 6, under same case, 72. The *lex fori* must determine the mode in which relief will be administered: *Rosci v. Crist*, 65 Id. 679, and note 682.

McKEE v. PHOENIX INSURANCE COMPANY.

[28 MISSOURI, 323.]

PREMIUMS PAID ON LIFE POLICY may be recovered by the assured from the insurer as money had and received, if the latter wrongfully refuses to receive a premium when due on such policy, and the insured may treat the contract of insurance as at an end.

POLICY INSURING HUSBAND'S LIFE FOR BENEFIT OF WIFE is not terminated by the wife applying for and getting a divorce from the husband.

PLANTIFF insured her husband's life. She had four children. Afterwards he abandoned her. For that cause she procured a divorce from him. For two years after she paid the premiums on the policy of insurance, and then the insurance company

refused to receive any more premiums, claiming that she and her late husband were strangers, and that she no longer had an insurable interest in her husband's life.

Morehead, for the plaintiff in error.

S. T. and A. D. Glover, for the defendant in error.

By Court, SCOTT, J. On what ground did the company claim to hold the premiums paid after the divorce, even admitting that the divorce determines the contract? Will they pretend to hold them on the ground that they were ignorant of the fact that a divorce had been obtained? If they were ignorant of the fact, would that entitle them, against all conscience, to retain this unfortunate woman's money? The clause in the contract, that "in every case where this policy shall cease, or become null or void, all previous payments made thereon shall be forfeited to the said company," had nothing to do with these payments; nor do we presume it will have any application where the policy ceases by the wrongful act of the company.

If the defendant (the company) wrongfully determined the contract by refusing to receive a premium when it was due, then the plaintiff had a right to treat the policy as at an end, and to recover all the money she had paid under it.

We will not undertake to say, from the pleadings in the cause, as they appear to us, that the wife, by suing for and obtaining a divorce from her husband, ceased to have such an interest in his life as would render an assurance of it by her illegal. There seems to be a difference of opinion among jurists as to the legality of life insurances, where the party insuring has no interest whatever depending on the life of the person insured: *Phillips on Ins.* 131; *Angell on Fire and Life Ins.* 307. There is nothing in the contract, as stated in the petition, which shows it to be a wagering one, or in any wise contrary to public policy. We see no danger to the interests of the community in sanctioning this policy. Why should not a mother, who has four children by a man from whom she has been divorced, be permitted to insure the life of that father to whom her children may look for support? If the care and custody of the children have by the decree of a divorce been intrusted to the mother, that will not extinguish the obligation of the father to provide for them. It is nevertheless his duty, though divorced, and the care of the children taken from him, to support them. That natural obligation, by his own act, cannot be impaired or destroyed.

There may be a provision decreed the wife for her support, to be paid by the husband. This would in effect make her the creditor of her husband, and being so, she would, without controversy, have a right to insure his life.

The question of the measure of damages for a breach of the contract to insure the life of the husband, he being still alive, has not been argued, and we express no opinion in relation to it. Certainly the mere return of the premiums with interest would not be the standard in all cases. In many it would be very unjust, especially after the policy had continued for years, and the period of existence had consequently been shortened. If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in his dissolution, the insurer would not be permitted to escape the payment of the amount for which the life was assured by putting an end to the contract of insurance.

Reversed and remanded.

NAPTON, J., concurred.

RICHARDSON, J., did not sit in this case.

INSURABLE INTERESTS IN LIFE OF ANOTHER, WHO HAS: *Mitchel v. Union Life Ins. Co.*, 71 Am. Dec. 529, and note 530. An assignee of life policy need not have insurable interest in life of assured to enable him to recover on policy: *St. John v. American Mutual Life Ins. Co.*, 64 Id. 529, and notes 531, 532.

THE PRINCIPAL CASE IS APPROVED as to interest of wife in life of husband in *Gambo v. Ins. Co.*, 50 Mo. 48; cited in *Chisholm v. Ins. Co.*, 52 Id. 216; *Singleton v. Ins. Co.*, 66 Id. 72, 73.

THE PRINCIPAL CASE IS CITED, DISTINGUISHED, CRITICIZED, AND HELD NOW TO BE IN POINT in *Rumbold v. P. M. L. Ins. Co.*, 7 Mo. App. 72, on the question of insurer refusing to receive premiums, or refusing to issue paid-up policy to insured.

ST. LOUIS PUBLIC SCHOOLS v. RISLEY.

[26 MISSOURI, 415.]

IN EJECTMENT, COURT CANNOT REQUIRE PLAINTIFF TO ELECT to try his cause and rest upon one title when he has two titles to the premises in controversy. He has a right to put both in evidence.

PERSONS WHO ARE NOT PRIVIES CANNOT DISPUTE the authority of persons performing an act as agent of another.

WHEN COMMON SEAL OF CORPORATION appears to be affixed to an instrument, and the signature of the proper officers are proved, courts are to presume that the officers did not exceed their authority.

EJECTMENT. Plaintiff claimed title from the United States, and also from the state of Missouri, both through the city of St. Louis. The legislature authorized the city, by its mayor, to convey the premises in controversy to plaintiff. Mayor of St. Louis conveyed premises as act of the city, and attached seal of city to deed. Trial court required plaintiff to elect which title he would rely on. Plaintiff elected to rely on state's title. He offered other title in evidence. Court ruled it out, on ground that plaintiff had elected to rely on the state title. Plaintiff appeals.

Casselberry, for the appellant.

E. Bates, for the respondent.

By Court, SCOTT, J. We do not see on what ground the court compelled the plaintiff to elect on which of his titles he would base his right of recovery. This is an action of ejectment, and the plaintiff's right to the immediate possession of the land in controversy is averred in the petition. Now, if the plaintiff in making out this case should fail to establish one title on which he relied, on what principle would he be restrained from falling back on another title which showed his right to a recovery? Is not this every day's practice? We do not see what connection the power assumed by the courts of compelling the party to elect when causes of action are improperly joined has with this question. Here there is but one cause of action for one specific thing, and there can be no reason why, if the plaintiff fails to establish his right to recover by one title, he should be denied the privilege of resorting to another.

It will not be maintained that the legislature can authorize any person or officer to convey away the property of a corporation against its will. But the efficacy of the deed under which the plaintiff claims does not necessarily stand on the act of the general assembly authorizing the mayor of the city to execute it. The objection that this deed is not the act of the corporation does not come from the corporation itself. From anything that appears, the corporation is satisfied with the act of the mayor and is willing to abide by it. If the corporation had denied the authority of the mayor, we know that there would have been no want of evidence of the fact. When a municipal corporation is satisfied with the act of its agent, and is willing that it should stand, there should be a solid reason why third persons, who have no interest in the matter, should

be permitted to invalidate it. If an act has been done for and in the name of another, and he being aware of it does not object to the want of authority in his agent, why should a third person be suffered to do it for him? These considerations serve to show the reasonableness of the rule in law, that when the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority. The contrary must be shown by the objecting party: *Angell & Ames on Corp.*, sec. 224; *Berks etc. Turnpike Road Co. v. Myers*, 6 Serg. & R. 12 [9 Am. Dec. 402]. This is not a case involving the question whether a corporation under its charter has authority to do an act. Where the question is as to the power of a corporation as an entire body to do a thing, there, of course, the affixing of the seal is no evidence of its authority. But when an act is within the powers of a corporation, and its existence is witnessed by an instrument clothed with the formalities requisite to bind it, there is no hardship in the rule which imposes on one objecting to its validity the necessity of showing that it was without the assent necessary to its existence.

Reversed and remanded.

COURTS PRESUME, WHEN COMMON SEAL OF CORPORATION IS AFFIXED to an instrument, and the signatures of the proper officers are proved, that they did not exceed their authority. The contrary must be shown by the objecting party: *City of Kansas v. H. & S. J. R. R. Co.*, 77 Mo. 185, citing the principal case.

DUNNICA v. COY.

[28 MISSOURI, 525.]

IF TO DEFRAUD CREDITORS a purchaser of land causes the deed to be given to another person, a resulting trust will arise in favor of the creditors, and the land may be seized and sold on execution, and the purchaser may, upon establishing such facts, have a decree vesting the legal title in himself.

WHEN STATUTE REQUIRES ALL WRITS NOT EXHIBITED by a sheriff whose term of office has expired to be turned over to his successor in office, an execution received and levied upon property is in a condition to be so turned over. His successor may advertise and sell the property.

BILL in equity. Petition shows that to defraud his creditors John Coy, being insolvent and indebted to plaintiff, conveyed some slaves to his brother, Collins Coy, and in exchange bought

land; that he caused said Collins Coy to make title bond to John Prewitt for the use and benefit of Elizabeth Coy, his wife, and her children; that Collins was privy to the fraud; that plaintiff had judgment and execution against John Coy, under which land had been sold to plaintiff. The other facts are stated in the opinion.

Turner, for the appellants.

Shackelford, for the respondent.

By Court, RICHARDSON, J. It is recited in the sheriff's deed under which the plaintiff claims that the execution was issued on the first day of April, 1854, directed to the sheriff of Chariton county, and delivered to Henry H. Davis, who was at that time sheriff of the county; that Davis levied the writ on the land in controversy, but that Robertson Moore, the successor in office of Davis, advertised the land for sale, conducted the sale, and made the deed to the plaintiff. The defendant insists that the deed is void, for the reason that the execution was delivered to and levied by one sheriff, and the sale was made by his successor.

It does not appear how the sheriff who first received the writ had levied it. He did not advertise the land for sale; and as he was not required to make an actual or symbolical seizure of it, *Wood v. Colvin*, 5 Hill, 228 [38 Am. Dec. 598], it is difficult to perceive how he had made a levy at all; and it may be inferred from the circumstances that he did nothing more than indorse on the writ that he had levied it on the land in dispute. The writ, then, was not executed within the meaning of the statute, but was in a condition that authorized the sheriff who received it to deliver it to his successor, as provided by the fifty-second section of the execution law of 1845, which declares that "whenever the term of office for which any sheriff shall have been elected has expired, or he shall have resigned or removed without the county, or be removed from office, it shall be his duty to deliver over all writs of execution not executed to such person as may have been elected or appointed, and qualified to discharge the duties of sheriff; and such new sheriff shall receive all such writs and proceed to execute the same in the same manner as if such writs had been originally directed to him."

The right of the plaintiff to recover upon proof of the allegations in his petition was established by the principle decided

in the case of *Rankin v. Harper*, 23 Mo. 579, and we think the evidence was sufficient to warrant the decree.

The judgment will therefore be affirmed, the other judges concurring.

TRUST RESULTS IN FAVOR OF CREDITORS against one to whom debtor has caused the title to realty to be conveyed, for purpose of defrauding his creditors. Creditors may take such realty in execution and satisfy their claims, and the purchaser may in equity compel the holder of the legal title to convey it to him: *Dumica v. Coy*, 60 Am. Dec. 420, and note 422; *Huggins v. Parvise*, 68 Id. 131, and note 133, where the subject of resulting trusts is discussed and authorities cited.

JUDGMENT CREDITORS MAY MAINTAIN bill in equity to remove fraudulent conveyance or incumbrance of debtor's property, and have same applied in satisfaction of his judgment: *Dunham v. Coz*, 64 Am. Dec. 460, and note 464; *Snodgrass v. Andrews*, Id. 169. Administrator of a decedent's estate, even though he is a creditor, cannot impeach the fraudulent deed of such deceased. It must be done by other creditors: Id., note 175.

VOLUNTARY CONVEYANCE CANNOT BE IMPEACHED by those who become creditors after the execution of the conveyance: *Inhabitants etc. v. Aldrich*, 60 Am. Dec. 266, and note 267.

THE DOCTRINE LAID DOWN in the principal case is approved in *Merchants' Bank v. Harrison*, 39 Mo. 443, in relation to the levy of an execution which has been placed in the hands of an officer whose term expires before he has made a levy under the writ. See also *Duncan v. Matney*, 29 Id. 368, where a similar doctrine is laid down.

CLIMER v. WALLACE.

[26 MISSOURI, 554.]

WORM-FENCE IS FIXTURE, AND PASSES by deed along with the land on which it is built.

REALTY PURCHASED WITHOUT NOTICE OF EQUITIES in favor of owner of adjoining land, arising out of verbal agreements between him and the grantor, will not bind the grantees.

FENCE BUILT BY MISTAKE OVER LINE will pass to the purchaser of the land on which it stands, although it was agreed that it should remain the property of the one who erected it.

THE facts are stated in the opinion.

Parsons and Pomeroy, for the appellant.

Ewing and Batte, for the respondents.

By Court, SCOTT, J. One Pinnell and the defendant Wallace were owners of a tract of land adjoining each other. It seems that the two tracts were legal subdivisions of sections as required to be subdivided by the laws of the United States.

They agreed to run a partition fence between them, each one to have the portion of the fence he should make. Before the fence was put up, the line was run by the county surveyor between the owners, and it was supposed that each owner had put his portion of the fence on his own land. Afterwards Pinnell conveyed his tract to the plaintiffs, G. and J. Climer. The defendant, having cause to apprehend that his fence was over the line, and on the land which the plaintiffs had purchased from Pinnell, removed the fence he had put up a few feet, and placed it on his own land. There was some evidence that the plaintiffs at the time of their purchase from Pinnell were aware of the existence of the agreement between him and the defendant Wallace in relation to the dividing fence, and that one of them said that the defendant Wallace was entitled to the rails, as he had made and put them up, and should have them if he would let them remain where they were. This is an action for taking away or removing the rails by the defendant. There were many instructions in the case, all of which will not be noticed. There was a verdict for the plaintiffs and a new trial granted, and on a second trial there was again a verdict for the plaintiffs.

This seems to be a hard action, judging from what appears on the record, but the law must have its way. Our courts hold that a worm-fence is a part of the freehold, and passes along with the land on which it is built. The agreement between Pinnell and the defendant Wallace in relation to the fence did not affect the plaintiffs. They would look to the title papers of Pinnell in order to ascertain what they were buying, and if they showed that they were entitled to the fence, by reason of its being part of the estate which they purchased, they could not be affected by any agreement to which they were not parties, and of which they had no notice. Wallace, the defendant, should have seen that his agreement with Pinnell was put upon the record in such a way as to be noticed. The jury found that the plaintiffs had no notice of the agreement, for, by an instruction given by the court, the case was made to turn on the fact whether the plaintiffs had notice of the agreement between Pinnell and the defendant.

The corners established by the original surveyors under the authority of the United States could not be altered, whether properly placed or not, and no error in placing them could be corrected by any survey made by individuals or by any surveyor deriving his authority from the laws of the state. This it is

conceived is the idea conveyed by the instruction given by the court at its own instance, which, though not very happily expressed, could not have misled the jury, as it does not appear that the fact that the fence was on the land of the plaintiffs was contested on the trial. The other surveys were offered, at least those on the part of the defendant, to show the innocency of his intention in placing the fence where he did.

Affirmed.

The other judges concurred.

PAROL LICENSE HAS NO GREATER EFFECT than an unrecorded deed, and a subsequent purchaser of the land, or of a lease of it, having no notice of the equity in favor of the licensee, would not be bound by it: *Burr v. Spencer*, 68 Am. Dec. 331; which is the same principle laid down in regard to the fence in the principal case.

OWNER OF LAND ENTITLED TO FIXTURES, WHEN AND WHEN NOT: *Rice v. Dudley*, 67 Am. Dec. 238, 239, and note under that case 241; *Wall v. Hinds*, 64 Id. 64, and notes 75, 76.

FIXTURES DEFINED: See *Richardson v. Copeland*, 66 Am. Dec. 424, and note thereunder 428.

ENGINES AND BOILERS FIRMLY FIXED TO FREEHOLD, and used to furnish motive power to machinery, are a part of the realty: *Id.*; *Wall v. Hinds*, 64 Am. Dec. 64, and notes 75, 76.

HOP-POLES used for cultivating hops on farm are fixtures: *Bishop v. Bishop*, 62 Am. Dec. 68.

FIXTURES GENERALLY: See *Bishop v. Bishop*, 62 Am. Dec. 68, note 69, 71, where authorities are collected and prior cases in this series cited.

FENCE IS PART OF FREEHOLD, and the fact that some of the materials of which it is composed were accidentally or temporarily detached worked no change in their nature: *H & S. J. R. R. Co. v. Crawford*, 66 Mo. 82.

HARDESTY v. NEWBY.

[28 MISSOURI, 567.]

NEGOTIABLE NOTE DELIVERED BY PAYEE FOR COLLECTION, AND NOT INDORSED, cannot be, by the collector, transferred, without an express authority from the payee. Possession does not raise a presumption that he has a right to transfer the note.

BURDEN OF PROOF IS ON HOLDER of note to show the proper assignment thereof.

THE facts are stated in the opinion.

J. N. and C. F. Burnes, for the appellant.

Doniphan and Lawson, for the respondent.

By Court, NAPTON, J. This was a suit upon a negotiable note purchased by the plaintiff from one Love, who professed to be the agent of the payee Mason, and who, in that capacity, indorsed it to plaintiff. It appeared that Mason handed the note to Love for collection, and Love had no express authority from him to sell or transfer it by assignment. The court held that the mere possession of the note by Love raised a presumption that he had authority to pass title, and that it was incumbent on the defendant, who was the maker of the note, to show that Love was not authorized to transfer the note, and that this want of authority was known to the plaintiff.

This view of the subject is, in our judgment, erroneous. A negotiable note, after due, and without any indorsement by the payee, occupies, so far as this question is concerned, no other position than a note not negotiable would. A party buying such paper from a stranger professing to be an agent of the payee must establish the agency. Such agency may undoubtedly be either express or implied, but the mere circumstance of possession, when the note is not indorsed in blank, can raise no presumption either way. The natural and reasonable inference would be that the note was in the hands of such an agent merely for collection; for if a transfer had been designed by the owner of the note, he would, of course, put his name on the back of it.

The case of *Bay v. Coddington*, 5 Johns. Ch. 50 [9 Am. Dec. 268], does not maintain any principle conflicting with this view. The notes in that case were indorsed in blank, and the court held that if they had been transferred in the usual course of trade, and without any notice in the purchaser of the fraud of the agent or factor, a good title would have passed. But as the transaction was not regarded as a fair one, the transfer was not considered valid. This case, and others of a similar character, are cases of the transfer of negotiable paper, indorsed in blank by the payee, or payable to order. The title in such cases is held to pass where there is no fraud upon the part of the purchaser, however destitute of authority may be the agent from whom the title is acquired.

In the present case it devolved on the plaintiff, as he held the note by assignment, to prove the assignment; and as it purported to be executed by an agent, the further proof of agency was necessary. In many cases, very slight proof will establish this, owing to the previous dealings or relations of the parties. Here there was nothing to show an authority, either express or

implied, but the bare circumstance of possession—a fact which could properly lead to no other conclusion than that the agent was an agent for collection, and not for a sale of the note.

Judgment reversed and case remanded.

The other judges concurred.

TUCKER v. FREDERICK.

[28 MISSOURI, 574.]

ONE GROUND OF ATTACHMENT is sufficient to maintain a writ that has been issued on two grounds. If one ground is proved and the other cannot be, the writ will be upheld.

DECLARATIONS OF DEFENDANT made after proceedings commenced against him are not admissible in evidence to explain away the effect of previous declarations.

THE facts are stated in the opinion.

Ryland and Son, and Smith and Bouton, for the appellant.

Hovey, for the respondent.

By Court, RICHARDSON, J. This suit was commenced by attachment on the ground that the defendant was about to remove out of this state with intent to defraud, hinder, or delay her creditors, and also that she was about to move out of the state with intent to change her domicile. The defendant by plea put in issue the truth of the affidavit. On the trial of the plea in abatement, the plaintiff introduced evidence tending to show that two or three days before the commencement of the suit the defendant offered to sell the lease of the house she occupied and a portion of her furniture, and stated at the time that she intended to remove to the territory of Kansas; also that she spoke of removing to Monticello, a town in Kansas, for the purpose of keeping a boarding-house, and that a few days after the attachment was served, she did remove to Monticello, where she has ever since resided with her family. All the plaintiff's evidence bore on the allegation in the affidavit that the defendant was about to remove out of the state with intent to change her domicile. The defendant was allowed to prove by one witness, that prior to the attachment she proposed to sell out to him, and stated that she desired to apply a portion of the proceeds to the payment of the plaintiff's demand; and by another witness, that after the attach-

ment had been levied, she told him she would not have removed to Kansas but for the attachment which had broken her up.

This evidence was improperly admitted, for the law authorizes an attachment on the simple ground that the defendant was about to remove out of the state with the intention of changing her domicile, without regard to her purposes in reference to her creditors, and therefore if she intended to go to Kansas with the view of residing there, it was immaterial whether or not she intended to apply a portion of the proceeds of her property to the payment of the plaintiff's debt; and her declarations made after the attachment were clearly inadmissible to explain away the effect of previous declarations.

The other judges concurring, the judgment will be reversed and the cause remanded.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

CALL v. GRAY.

[87 NEW HAMPSHIRE, 428.]

DELIVERY OF ARTICLES TO AND POSSESSION BY the mortgagee are not essential to the validity of a chattel mortgage in New Hampshire. Registration in the office of the town clerk where the mortgagor resides is sufficient.

IN SALE OF PERSONAL CHATTELS, delivery of possession is necessary, as against all except the vendor. But as between the vendor and vendee, the property will pass without delivery.

AS BETWEEN PARTIES TO RECORDED CHATTEL MORTGAGE in New Hampshire, no formal delivery being required, particular specification and identification of the mortgaged articles is unnecessary to enable the mortgagee to make a selection of such articles from others of like nature belonging to the mortgagor.

ASSUMPSIT on a promissory note made by Guy and Wilson Gray. Guy Gray was called upon by plaintiff to pay the note. This he was unable to do, but promised to secure it. He then gave a new note, secured by a mortgage on a lot of household furniture. This furniture, together with a large quantity of other of the same kind as that mortgaged, was, at the time, in the dwelling occupied by said Guy Gray, who represented that all of the furniture was his, and the mortgage was given for a certain number of beds, chairs, etc., without any further designation. It appeared in proof, however, that only about one half of the furniture belonged to said Guy, the rest belonging to Wilson Gray. It also appeared that said Guy, when it was sought to enforce said mortgage, proclaimed that all of said furniture belonged to Wilson Gray, that he claimed none of it, and that said Wilson claimed the whole. However, Wilson

Gray testified that he owned only a part of the furniture, and that said Guy owned as much thereof as he had mortgaged. Plaintiff claimed the right to select from all the furniture in the house the articles mortgaged to him, if Guy Gray claimed all of such furniture, and that as he did not own the whole, he had been guilty of misrepresentation and fraud. Plaintiff also claimed the right to surrender the new note, and obtain payment of the old, which was given up when the new note and mortgage was given. The court instructed the jury in accordance with plaintiff's views, and the jury returned a verdict in his favor. Defendants excepted to the instructions given.

Minot and Mugridge, for the defendants.

Rolfe and Marshall, for the plaintiff.

By Court, EASTMAN, J. If the plaintiff was induced to surrender the note in suit by the misrepresentation and fraud of Guy Gray, one of the signers of the note, it is plain that such surrender would not operate to pay the debt or cancel the note, and that a suit may be maintained upon the note against both of the makers. This position is not controverted by the defendants' counsel.

It is contended, however, that the mortgage taken by the plaintiff from Guy Gray, upon the giving of the new note, did not convey any specific articles, and was therefore void; and hence that the representations of Guy Gray, whether true or false, were immaterial.

The mortgage was of a lot of household furniture, not of any particular articles, but of a certain number of beds, chairs, etc., in the house, without any further designation. The kind of articles is given, and their number and the place where they are kept, but there is no specific and particular description by which to identify them from other like articles which were in the house. The question then is, Would this have been a good mortgage, as between the mortgagor and mortgagee, had Guy Gray been the owner of all the furniture in the house, as represented by him?

In *Heyward's Case*, 2 Co. 38, it is said, "If I give you one of my horses in my stable, there you shall have election. And if one grant to another twenty loads of maple, to be taken in his wood, there the grantee shall have election." And in *Palmer's Case*, 5 Id. 24, the court say: "If a man grant six hundred cords of wood out of a large wood, the grantee hath election to take them when and in what part of the wood he pleases, without

any appointment of the grantor:" *Basset v. Maynard*, Cro. Eliz. 819; S. C., Moore, 691; *Mathewes's Case*, W. Jones, 276; *Stukeley v. Butler*, Hob. 179.

The doctrine is the same as that which prevails in the conveyance of real estate—that the grant shall be taken most strongly against the grantor.

When personal chattels are mortgaged, delivery to and possession by the mortgagee are not essential to the validity of the mortgage. Registration in the office of the clerk of the town where the mortgagor resides is sufficient: R. S., c. 132, sec. 2.

In the sale of personal chattels, the general rule is that delivery of possession is necessary, as against all except the vendor; but between the vendor and vendee the property will pass without delivery: *Shumway v. Rutter*, 7 Pick. 56 [19 Am. Dec. 340]; *Ricker v. Cross*, 5 N. H. 570 [22 Am. Dec. 480]; *Felton v. Fuller*, 29 N. H. 121, 129.

The cases which show that trespass and trover cannot be maintained until the property is separated and identified depend upon the principle that property in the particular articles is indispensable, in order to sustain those actions. If specific articles are alleged to have been converted or injured, the plaintiff must show such articles to be his. But in the case of a recorded mortgage under the statute, no formal delivery being required, such particular identification is, as between the parties, unnecessary. And the question in this case is, not as to the plaintiff's right to maintain trespass or trover, but as to the effect of the mortgage.

And we think that as between the mortgagor and mortgagee, had the representations of Guy Gray been true, the plaintiff would have held a good mortgage, which would have given him the power to enter the house and take the property mortgaged.

He would have had the right to select the number of beds, chairs, etc., stated in the mortgage. The mortgagor had conveyed to him the articles by number; they had been delivered to him by the delivery and record of the mortgage, and this delivery, so far as the parties were concerned, was as binding as if the plaintiff had taken them into actual possession. The mortgagor had nothing further to do to make the mortgage perfect, and the plaintiff had the right to make a selection of the articles.

The mortgage, then, so far as the instrument itself went, was

legal between the parties; and the representation of the mortgagor, that he owned all the property, was material, and being falsely made, was evidence of fraud in procuring the surrender of the note. The ruling of the court was therefore correct, and the exceptions must be overruled and the judgment affirmed.

CHattel Mortgage Valid without delivery of mortgaged property: *Luchette v. Townsend*, 49 Am. Dec. 723; *Tannahill v. Tuttle*, 61 Id. 480, and note 490.

SALE WITHOUT DELIVERY IS VALID AGAINST VENDOR: *Webber v. Davis*, 69 Am. Dec. 87, and note collecting prior cases 90.

BUNTON v. LYFORD.

[87 NEW HAMPSHIRE, 512.]

IN NEW HAMPSHIRE, NO WRITTEN WARRANT IS NECESSARY to authorize an appearance by a regular attorney; and until the contrary appears, his authority will be presumed.

JUDGMENT AND EXECUTION RECOVERED AGAINST PARTY by the unauthorized appearance, in his name, of a regular attorney, will not be enjoined, in the absence of proof of collusion. Redress must be sought in an action against the attorney.

BILL in equity to enjoin the execution of a judgment for costs, and to restrain the negotiation and collection of a note given for such costs. Plaintiff David A. Bunton, R. B. Dunn, and others claimed to be the owners of a certain undivided tract of land, and defendant filed a petition for partition of said tract, alleging to be the owner of one eighth thereof. Public notice of the petition was given, pursuant to an order of court. When the action came up for hearing, a regular attorney of the court appeared and entered the names of Bunton, Dunn, and the other claimants, as parties defendant to the petition for partition, and in their names defended the suit to final judgment. This was done by direction of Dunn, without any communication with or authority from the other claimants. Defendant had judgment for partition and costs against plaintiff and the other claimants. Execution issued on said judgment, and defendant demanded payment thereof from plaintiff, who, to avoid attachment, gave his note for the amount of said costs. Other facts appear from the opinion.

S. N. Bell, for the plaintiff.

Lyford, for the defendant.

By Court, PERLEY, C. J. The complainant does not seek to set aside the judgment for partition, in that he has had no interest since his conveyance to Dunn, on the thirtieth of April, 1853, more than three years before the judgment was rendered. He prays for an injunction against execution of the judgment for costs, and against the negotiation and collection of the note which he gave for the costs. There is no suggestion of any fraud or misconduct in the defendant Lyford, nor of any collusion between him and the attorney who appeared for the complainant in the petition for partition; nor that the gentleman who appeared for him was not a regular attorney of the court; or that he was not and is not of sufficient ability to answer for any damage that the complainant may have suffered from an unauthorized appearance in his name.

In our practice no written warrant is necessary to authorize an appearance by a regular attorney of the court, and till the contrary appears, it will be presumed that such an attorney has due authority for his appearance: *Manchester Bank v. Tilton*, 28 N. H. 302. Such being the practice, the plaintiff has a right to rely on the presumption that an appearance for the defendant by an attorney of the court is made with sufficient authority; and unless there were something in the circumstances of the case to raise a suspicion that the appearance was unauthorized, it would justly be regarded as a troublesome and captious course to call for proof of the attorney's authority. In this case the attorney was in regular practice; the persons whose names he entered as defendants were in fact owners or claimants of undivided shares in the land, and the plaintiff had no reason, that we can perceive, to suspect that the attorney appeared without authority.

In such case, the attorney being in regular practice and perfectly responsible, the judgment must stand, and the redress of the defendant, if he has suffered from an unauthorized appearance in his name, must be sought in some proceeding against the attorney: *Jose v. Mills*, 6 Mod. 14; *Stephens v. Squire*, 5 Id. 205; *Anonymous*, Salk. 86, 88; *Jackson v. Stewart*, 6 Johns. 34; *Denton v. Noyes*, Id. 300 [5 Am. Dec. 237]; *Reed v. Pratt*, 2 Hill (N. Y.), 66; *Smith v. Bowditch*, 7 Pick. 138; *Cyphert v. McLane*, 22 Pa. St. 195; *Kent v. Ricards*, 2 Md. Ch. 392.

The grounds and reasons of this rule are fully explained in *Denton v. Noyes*, *supra*.

Bill dismissed, with costs.

JUDGMENT BY UNAUTHORIZED APPEARANCE OF ATTORNEY—WHETHER VOID, VOIDABLE, OR CONCLUSIVE.—In Weeks on Attorneys, sec. 201, is found the following unsatisfactory language: "The subject of the effect of a judgment procured by the acts of an unauthorized attorney opens up one of those embarrassing questions about which few agree, upon which the most contradictory views are expressed with equal certainty, and which the more it is discussed the less settled it appears to become. Is a judgment so procured void, or voidable, or absolutely conclusive?" On the other hand, Mr. Freeman, in his treatise on the law of judgments, sec. 499, has said, while treating of this branch of the subject: "Now, it seems to be a rule applicable to the greater part if not to the entire United States, that a judgment resting upon the unauthorized appearance of an attorney may be annulled in equity, irrespective of the question whether the attorney is responsible or irresponsible, the judgment lien being preserved to secure the plaintiff from loss should he afterwards recover at a trial on the merits." This latter author then proceeds to adopt the views expressed by Mr. Chief Justice Dillon in *Harshey v. Blackmarr*, 20 Iowa, 161-174, that "no examination of this subject would be complete or satisfactory without a reference to the leading cases respecting it, decided in the English and American courts. It is laid down in an early case [*Anonymous*, 1 Salk. 86], that 'when an attorney takes upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.' The rule has, we submit, no foundation in reason to stand upon. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by the judgment of a court without a day in court. It relieves the other party of a duty which in reason belongs to him; viz., to serve his process, and to see, at his peril, that his adversary is in court. And it carries out this unsoundness by compelling the wrong party to look to the attorney. True reason and logic would say, If an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act, if never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority and carelessly omitting to serve process, or to require the attorney to show his authority, has been damaged, he, and not myself, should be the one to look to the attorney.

"That such a rule as the one laid down in *Salkeld*, *supra*, should permanently stand, without modification, as the law of enlightened tribunals, would be impossible. But, as I shall proceed to show, the courts, instead of overruling it at once, have gradually undermined it, until, if it now stands, it is tottering and ready to fall." The learned chief justice then cites *Robson v. Eaton*, 1 T. R. 62 (K. B., 1785), and says that "such a doctrine could not impose upon the fine understanding and solid judgment of Lord Mansfield," who, "without professedly overruling the case in *Salkeld*, *supra*, does so in effect by proceeding upon directly opposite principles." He afterwards cites *Bayley v. Buckland*, 1 Exch. 1 (1847), S. C., 16 L. J., N. S. (Exch.), 204, as criticising, and partially at least overturning, the rule as laid down in *Salkeld*, *supra*.

In *Harshey v. Blackmarr*, 20 Iowa, 181, will be found collected a large number of authorities, which may be consulted by those inclined further to pursue this subject in the light of English adjudications. The rule as here laid down has been followed with approval in the subsequent Iowa cases: See *Newcomb v. Dewey*, 28 Id. 381, and *Macomber v. Peck*, 39 Id. 351, holding that the failure to serve a party in interest with notice renders void a judgment which deprives him of substantial rights. Jurisdiction is not conferred

by an unauthorized appearance entered by attorneys. "In other states, it is now the constant practice to relieve parties, sometimes by motion and sometimes in chancery, from judgments rendered against them in consequence of the totally unauthorized acts of a pragmatical attorney:" *Harshey v. Blackmar*, 20 Id. 179. Taken with the qualification that a presumption always exists in favor of the attorney that his appearance is authorized, and that this presumption must be overcome by proof before the judgment will be declared void or set aside: See note to *McAlexander v. Wright*, 16 Am. Dec. 98-100. The principles above stated are unflinchingly supported by a host of authorities, among which may be mentioned the following: *Gifford v. Thorn*, 9 N. J. Eq. 702-722; *McKelway v. Jones*, 17 N. J. L. 345; *Price v. Ward*, 25 Id. 225; *Ellsworth v. Campbell*, 31 Barb. 134; *Rogers v. McLean*, Id. 304; *Allen v. Stone*, 10 Id. 547; *Campbell v. Bristol*, 19 Wend. 101 (where the attorney was insolvent); *Porter v. Bronson*, 19 Abb. Pr. 236; S. C., 29 How. Pr. 292; *Yates v. Horanson*, 7 Robt. 12; *Shelton v. Tylla*, 6 How. 163; *Marvel v. Manowrier*, 14 La. Ann. 3; S. C., 74 Am. Dec. 424; *Ridge v. Alter*, 14 La. Ann. 866; *Wiley v. Pratt*, 23 Ind. 628; *Truett v. Wainwright*, 4 Gilm. 418; *De Louis v. Meek*, 2 G. Greene, 55; *Koith v. Wilson*, 35 Am. Dec. 443; *Reynolds v. Howell*, L. R. 8 Q. B. 396; S. C., 6 Moak, 129, expressly overruling the rule laid down in *Anonymous*, 1 Salk. 86. The tendency of the latest decisions seems to be to establish the doctrine that a judgment resting upon the unauthorized appearance is absolutely void: *Reynolds v. Fleming*, 30 Kan. 106; S. C., 46 Am. Rep. 86; *Kepley v. Irwin*, 14 Neb. 300; *Brinkman v. Shaffer*, 23 Kan. 528, where it is held that where a third person makes an appearance in a case ostensibly as the agent of one of the parties to the suit, without any authority from him for so doing, and where jurisdiction of the party is not obtained in any other way, a personal judgment rendered against him is void. Again: "Where a court renders judgment against a defendant when the court had no jurisdiction of the person, no argument is needed to prove that such judgment is void, and a creditor's bill could not be predicated on a void judgment. Here an attorney at law appeared and interposed a demurrer to the declaration; he claims in his evidence that the appearance was special, for a particular purpose, and hence that the defendant was not in court by filing the demurrer, so as to authorize the judgment. We shall not stop to determine whether the appearance was general or special. The attorney had no authority whatever from the defendant to appear in the case, and as his acts were entirely unauthorized, what he did could not be binding on the defendant. It would be establishing a dangerous precedent to hold a judgment valid where there had been no service, merely for the reason that an attorney had appeared of his own motion, without authority, and filed some sort of plea in the case:" *Anderson v. Hawhe*, 1 Western Rep. 626 (Ill.); S. C., 3 N. E. Rep. 566; see also *Sherrard v. Nevius*, 52 Am. Dec. 508.

We now come to the consideration of the authorities which have maintained or are maintaining a contrary doctrine to that set forth in the former portion of this note. The principal of these is the early case of *Denton v. Noyes*, 6 Johns. 295, S. C., 5 Am. Dec. 237, where an attorney appeared for a defendant against whom a writ had been issued, but not served, and without authority confessed a judgment, and the judgment was held regular. The case, however, was decided by a divided court, and although the principle set forth in this case would seem to still be the law in New York, nevertheless, in the late case of *Brown v. Nichols*, 42 N. Y. 27, Judge Grover, in an able dissenting opinion, at page 35, expressly repudiates the authority of *Denton v. Noyes*, *supra*, on this proposition, while many cases are to be found in New York in

which, although the latter case is cited as controlling, this has been done with accompanying expressions of disapprobation by the ablest judges: See *Allen v. Stone*, 10 Barb. 547; *Meacham v. Dudley*, 6 Wend. 515; *Grauebrook v. McCreddie*, 9 Id. 437; note to *Denton v. Noyes*, 5 Am. Dec. 244. In *Town of St. Albans v. Bush*, 23 Id. 246 (Vt.), it is held that a plaintiff is bound by a judgment for costs, rendered against him in an action brought in his name by an attorney, without his knowledge or consent. So in the subsequent case of *Newcomb v. Peck*, 17 Vt. 302, where it appeared from the record that the defendant appeared in the original suit in which judgment was rendered, the court held that he was estopped by the record, in an action founded upon it in that state, from pleading that he did not appear, or that an appearance which was in fact entered for him was unauthorized by him, and without his knowledge. And again, in *Abbott & Co. v. Dutton*, 44 Id. 546, the court say, that whether the attorney was employed by the party or not, an appearance by such attorney binds the party for whom he appears.

In New Hampshire, the law as laid down in the principal case has always been adhered to, and in the late case of *Everett v. Warner Bank*, 58 N. H. 340, it is said: "The rule that an unauthorized appearance of a responsible attorney is valid and binding upon the party for whom the appearance is made has been recognized and adopted in this state, and we are inclined to regard the question as settled. In affirming *Bunton v. Lyford* [the principal case] and *Smyth v. Balch*, 40 Id. 363, we are not unmindful of the fact that the weight of authority in the American courts at the present time seems to be against the doctrine of those cases. . . . The rule as adopted in this state has always been distinctly recognized as an exception founded on the general ideas of justice and policy entertained by the court in this particular class of cases. We are not aware that any great injustice has resulted from it, and we are not now inclined to disturb it." The same rule maintains in North Carolina, where an appearance by counsel is regular upon its face, and is a good appearance in court, even though such appearance was unauthorized; *England v. Garner*, 90 N. H. 197; *University v. Lassiter*, 83 Id. 38. Some of the early California cases hold that a party would be bound by a judgment obtained against him through the appearance of an unauthorized attorney, and without service of process: *Suydam v. Pücher*, 4 Cal. 280; *Holmes v. Rogers*, 13 Id. 191; *Seale v. McLaughlin*, 28 Id. 668. But in *Baker v. O'Riordan*, 65 Id. 368, a decree of the probate court so obtained was held to be void, and that it did not affect the question of the right of a party to equitable relief against such decree that an unauthorized attorney appeared for him in the action.

COLLATERAL ATTACK.—In all collateral proceedings instituted to annul a judgment obtained through the unauthorized acts of an attorney, courts will presume, in the absence of evidence to the contrary, that the appearance of the attorney was made under the authority of the litigant: *Arnold v. Nye*, 23 Mich. 286; *Harshey v. Blackmarr*, 20 Iowa, 161. "This presumption is, in a collateral proceeding, not merely *prima facie*; it is conclusive, and the party whose appearance appears to have been made by an attorney will not be permitted to prove that he never authorized the attorney to represent him." Freeman on Judgments, sec. 128; *Rust v. Frothingham*, Breese, 258; *Newcomb v. Peck*, 17 Vt. 302; *Baker v. Stonebraker*, 34 Mo. 172; *Carpentier v. City of Oakland*, 30 Cal. 440; *Am. Ins. Co. v. Oakley*, 38 Am. Dec. 561; *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173; S. C., affirmed on appeal to the chancellor, 7 Paige Ch. 60; *Hamilton v. Wright*, 37 N. Y. 502; *Field v. Gibbs*, 1 Pet. C. C. 155. Two exceptionally strong cases on this point are those of *Reed*

v. Pratt, 2 Hill (N. Y.), 64, and Brown v. Nichols, 42 N. Y. 26; see also *Cyphert v. McClune*, 22 Pa. St. 195; *Rogers v. Burns*, 27 Id. 525. But other decisions are found which at least seem to indicate that the authority of the attorney for appearing can always be disputed and controverted by proof: *Shelton v. Tiffin*, 6 How. 163; *Shumway v. Stillman*, 6 Wend. 453; S. C., 15 Am. Dec. 374; *Reber v. Wright*, 68 Pa. St. 471; *Hess v. Cole*, 23 N. J. L. 116. Holding that the judgment of any court given without jurisdiction of the parties, either by actual or constructive monition or notice, is a nullity, and will be so treated when brought into question collaterally; for if it appear by the record that the defendant appeared by attorney, he may disprove the authority of such attorney. The same rule is laid down in *Anderson v. Haehe*, 4 Western Rep. 626 (Ill.); *Sperry v. Reynolds*, 65 N. Y. 179, reversing S. C., 5 Lana. 407; *Ferguson v. Crawford*, 70 N. Y. 253; S. C., 26 Am. Rep. 589. And see this latter case particularly for a lengthy discussion as to the conclusiveness of judgment records upon questions of jurisdiction, collating and distinguishing the authorities in the different states. But where judgment has been rendered upon the authorized appearance of an attorney, his acts may be so ratified by the payment to him of compensation for his services as to confirm the jurisdiction, and validate the judgment: *Ryan v. Doyle*, 31 Iowa, 53.

FOREIGN JUDGMENT.—In the case of suit upon a foreign judgment, it is now entirely settled, both in the state and federal courts, that the judgment debtor may successfully defend by showing that he was not served with process, and that the attorney who entered the appearance for him had no authority to do so: *D'Arcy v. Ketchum*, 11 How. 165; *Harris v. Hardeman*, 14 Id. 334; *Norwood v. Cobb*, 24 Tex. 551; *Wilson v. Bank of Mount Pleasant*, 6 Leigh, 570; *Starbuck v. Murray*, 5 Wend. 148; S. C., 21 Am. Dec. 172; *Aldrich v. Kinney*, 4 Conn. 380; S. C., 10 Am. Dec. 151; *Gleason v. Dodd*, 4 Met. 333; *Thompson v. Emmert*, 15 Ill. 415; *Hinman v. Mackall*, 3 G. Greene, 170. And "the general recital that the defendant appeared is, even in those states where direct jurisdictional statements are regarded as conclusive, susceptible of explanation and avoidance, by showing that the appearance was by an unauthorized attorney. It is also thought to involve no dispute with the record to show that the attorney, whom it states appeared, had no authority to do so:" Freeman on Judgments, sec. 563; *Rogers v. Owin*, 21 Iowa, 58; *Rape v. Heaton*, 9 Wis. 328; *Arnott v. Webb*, 1 Dill. 362; *Lawrence v. Jarvis*, 22 Ill. 304; *Baltzell v. Nosler*, 63 Am. Dec. 466; *Price v. Ward*, 25 N. J. L. 225. The rule is well settled that in an action on a foreign judgment the defendant may show that the appearance entered for him by an attorney was unauthorized: *Harshey v. Blackmar*, 20 Iowa, 161. Thus the defendant, when sued upon a foreign judgment in the home state, may plead and prove, notwithstanding any recitals in the record thereof, that he was not duly served with process, and did not authorize an attorney to appear for him in the action in which the judgment was rendered: *Gilman v. Gilman*, 126 Mass. 26; S. C., 30 Am. Rep. 646; *McDermott v. Clary*, 107 Id. 501; *Wright v. Andrews*, 130 Id. 149; *Ferguson v. Crawford*, 70 N. Y. 253; S. C., 26 Am. Rep. 589. And it has been said that there is "no direct or necessary conflict between an averment, on the one part, that the defendant appeared, and proof, on the other, that the appearance was by an attorney who did not represent the defendant:" *Mills v. Duryee*, 2 Am. Lead. Cas., 5th ed., 643; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight etc. Co.*, 19 Id. 58.

So a party may defend by showing, in an action on a judgment of a court of another state, that such court had no jurisdiction of his person. He may

For that purpose show that he had no legal notice of the foreign suit, and that he never authorized any one to use his name or to appear for him in such suit, and the mere recital in the judgment that the party "came in" does not show conclusively that he had legal notice; that he appeared in person and submitted to the jurisdiction, or that he duly authorized an appearance: *Watson v. New England Bank*, 4 Met. 343; *Gleason v. Dodd*, Id. 333; *Norwood v. Cobb*, 15 Tex. 500; *Chinn v. Gray*, 51 Id. 112; *Frimeran v. Leonard*, 7 Allen, 54; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 Id. 30; S. C., 7 Am. Rep. 299; *Noyes v. Butler*, 6 Barb. 613; *Mars v. Fore*, 51 Mo. 69; *Easley v. McClinton*, 33 Tex. 288; *Pollard v. Baldwin*, 22 Iowa, 328; *Dunlap v. Cody*, 31 Id. 260; *Carleton v. Bickford*, 13 Gray, 591; *Pennycott v. Foote*, 27 Ohio St. 600; *Eaton v. Pennycott*, 25 Ark. 144. It may therefore be stated that there is no doubt upon the subject that a "defendant sued here upon a judgment recovered against him in a court of record of another state, in which it is recited that he was served with process, or appears by attorney, may controvert such recital and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein by attorney or otherwise. The rule is the same when, instead of contradicting a mere jurisdictional recital, the defendant undertakes to show that the return of service indorsed on the summons is false." Freeman on Judgments, sec. 563, citing *Kingsbury v. Yniesta*, 59 Ala. 320; *People v. Dawell*, 25 Mich. 247; S. C., 12 Am. Rep. 260; *Bowler v. Huston*, 30 Gratt. 266; S. C., 32 Am. Rep. 673; *Webster v. Hunter*, 50 Iowa, 215; *Lowe v. Lowe*, 40 Id. 220; and see also, to the same effect, *Redus v. Burnett*, 59 Tex. 570; *Graham v. Spencer*, 14 Fed. Rep. 603 (Mass.).

EFFECT ON BONA FIDE PURCHASERS.—There is a controversy among the authorities as to the effect produced on *bona fide* purchasers without notice under a judgment obtained through the unauthorized appearance of an attorney. Decisions in Iowa declare that a judgment so obtained will be vacated in equity, though such vacation destroys the rights acquired by innocent third parties without notice: *Harshey v. Blackmarr*, 20 Iowa, 161-186; *Bryant v. Williams*, 21 Id. 329. Judge Dillon has said, when treating of the subject of judgments obtained by the acts of unauthorized attorneys: "Suppose property has been sold under it to third persons, for value and without notice, is the party whose property has been sold entitled, as to them, to have the judgment treated as a nullity? In our opinion, he is thus entitled, in case he has not been negligent, and can clearly establish that there was no notice or service, and that the attorney's act in representing him was wholly without his knowledge and totally without his authority:" 5 Am. Law Reg., N. S., 395.

The views above expressed are in accord with those enunciated by the supreme court of the United States in the case of *Shelton v. Tiffin*, 6 How. 163, where it is held that where a party is not amenable to the jurisdiction of the court, and did no act authorizing the judgment, he cannot be affected by it, or any proceedings under it: "The judgment being void for want of jurisdiction in the court, no right passed to Samuel Anderson, the purchaser, under the marshal's sale." See also Freeman on Judgments, sec. 509. On the other hand, the supreme court of California have commented on the Iowa cases cited *supra*, and have said relative to the doctrine there laid down: "If an unauthorized appearance by an attorney for a non-resident defendant, who was not served with process, can be afterwards shown to invalidate the title of a *bona fide* purchaser without notice at the execution sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doc-

trine ought not to be further extended:" *Reese v. Kennedy*, 43 Cal. 643-651; *Stokes v. Geddes*, 46 Id. 17. To this effect, see *England v. Garner*, 90 N. C. 197.

The recent amendments to the constitution of the United States professing to secure persons from being deprived of their property without due process of law have, in effect, made questions relating to attacks on judgments for want of jurisdiction a federal question; one in which the opinion of the state courts may be brought before the national courts for review. The decisions of the national courts are therefore conclusive on the state courts, and the latter must conform to them: *Belcher v. Chambers*, 53 Cal. 635. Under the decisions of the national courts, as we understand them, a judgment may be attacked, collaterally or otherwise, for want of jurisdiction.

WARRANT OF ATTORNEY to authorize the appearance of defendant by attorney not required: *Henck v. Todhunter*, 16 Am. Dec. 300, and note 301; *Corporation v. Lamson*, 33 Id. 656, and note 662. But the attorney may be required by the court to show his authority to represent the party for whom he appears: *Tally v. Reynolds*, 31 Id. 737; *Keith v. Wilson*, 35 Id. 443, and note 448.

RIDDLE v. GAGE.

[37 NEW HAMPSHIRE, 519.]

PARTIAL FAILURE OF CONSIDERATION is a good defense *pro tanto* to a promissory note, where the amount to be deducted on that account is matter to be ascertained by mere computation. But it is otherwise where such amount depends upon the ascertainment of unliquidated damages.

WHERE SEVENTEEN ARTICLES WERE SOLD for a certain sum, and five of them that went to make up the consideration for the note in suit were sold to satisfy an attachment existing at the time of the sale and when the note was given: *Held*, that to this extent the consideration for the note had failed; that as no specific value had been fixed to the articles at the time of the purchase, the value of the five sold was a matter unliquidated, and a recovery could be had for the full amount of the note.

MATTERS ADDRESSED TO DISCRETION OF LOWER COURT, and passed upon there, cannot be reviewed in the appellate court.

ASSUMPSIT on a promissory note for one thousand two hundred dollars given by Gage to one Hall, and by him indorsed to Riddle. Defendant confessed as to six hundred dollars, and pleaded the general issue as to the rest. Plaintiff produced the note declared upon, and its signature being admitted, he rested his case. Defendant then offered to prove that the note was given for machinery sold to defendant by Hall. That a portion of the machinery was under attachment at the suit of one of Hall's creditors, at the time of the sale, and this being known to both parties, Hall promised to pay off the attachment, but failed so to do, and that the machinery was sold for six hundred and five dollars. That at the time that the note was made it was indorsed to one Clark, as collateral security to

him, for having become surety on a note to plaintiff. A memorandum to this effect being made at the time at the bottom of the note, and signed by Hall and Clark, or by Clark alone. That this was torn off without defendant's knowledge. And that plaintiff, before he received the note, came to defendant's attorney and inquired about the note and the responsibility of defendant. That he was then informed of the facts as stated above, and that defendant would not pay the note unless obliged to do so. These facts, together with those stated in the opinion, were admitted, and plaintiff claimed that they constituted no defense as to the amount not confessed, the partial failure of consideration being for an amount unliquidated. The court so ruled, and directed a verdict for plaintiff for the full amount of the note. Defendant moved to set the verdict aside, and for a new trial.

Morrison and Stanley, for the plaintiff.

Clark and Smith, and C. R. Morrison, for the defendant.

By Court, EASTMAN, J. The plaintiff, having taken the note after it was dishonored, stands in the position of the original payee, and if the proposed defense would be good against him, it would be also good against the plaintiff.

The question then is, Did the facts stated by the defendant, and admitted by the plaintiff to be true, form a valid defense to a part of the note?

It was settled in *Drew v. Towle*, 27 N. H. 412 [59 Am. Dec. 380], that a partial failure of consideration is a good defense to a promissory note, where the amount to be deducted on that account is matter to be ascertained by mere computation, but that it is otherwise where such amount depends upon the ascertainment of unliquidated damages.

Greenleaf stated the rule thus: "If the consideration has only partially failed, and the deficiency is susceptible of definite computation, this may be shown in defense, *pro tanto*. But if the precise amount to be deducted is unliquidated, this cannot be shown in reduction of damages, but the defendant must resort to his cross-action:" 2 Greenl. Ev., sec. 199.

Other authorities may be cited to the same effect: Ch. Bills, 71; Story on Prom. Notes, sec. 187; Bayley on Bills, 393; 1 Saund. Pl. & Ev. 303, 304; *Haseltine v. Guild*, 11 N. H. 390; 2 Stark. 166; *Little v. Little*, 13 Pick. 426; *Moggridge v. Jones*, 14 East, 486.

Five of the articles of the machinery that went to make up

the consideration of the note in suit were sold to satisfy the attachment existing upon the machinery at the time of the sale to the defendant, and when he gave the note. To this extent the consideration of the note has failed; and had there been any specific value fixed to the articles when the defendant purchased them, the amount could now be deducted and allowed in this suit. But the value was not fixed. The whole seventeen articles were sold for one thousand two hundred dollars, and whether these five were worth five seventeenths of that sum, or one half, or one third, or what they were worth, is a matter entirely unliquidated; and upon the authorities cited, the ruling of the court excluding the defense was correct.

The sale by the officer on the execution was only evidence of the value. It settled nothing that would govern the parties to the note. Either would be permitted to show that the property was of a different value, upon a cross-action in regard to it.

The motions filed by the defendant for a continuance and stay of proceedings were matters addressed to the discretion of the court below, and having been passed upon in that court, cannot be reviewed here: *Wisheart v. Legro*, 83 N. H. 177; *Foss v. Strafford*, 25 Id. 78; *Sanford Man. Co. v. Wiggin*, 14 Id. 441 [40 Am. Dec. 198]; *Jenkins v. Brown*, 21 Wend. 454; *Feneley v. Mahoney*, 21 Pick. 212; *Clapp v. Hanson*, 15 Me. 345.

Judgment on the verdict.

PARTIAL FAILURE OF CONSIDERATION is a good defense *pro tanto* to an action on a promissory note, where the amount to be deducted is mere matter of computation, but a claim for uncertain or unliquidated damages can never be used as a set-off: *Drew v. Towle*, 59 Am. Dec. 330, and note 336. As to failure of consideration of note as a defense, see *Smith v. Busby*, 57 Id. 207, and note; *Brewer v. Harris*, 41 Id. 587.

UNCERTAIN DAMAGES AS SET-OFF: *Dugan v. Oureton*, 31 Am. Dec. 727, and note 737.

DECISION ON MATTER OF DISCRETION is not revisable on error: *Seabury v. Stewart*, 58 Am. Dec. 254; *Wann v. McNulty*, 43 Id. 58; *Moody v. Fleming*, 48 Id. 210, and note 216.

BROWN v. BROWN.

[37 NEW HAMPSHIRE, 586.]

DECREE RENDERED IN PROCEEDING FOR DIVORCE, dismissing the libel therefor upon a hearing of the merits, is a bar to a subsequent libel for the same cause of action between the same parties.

LIBEL for divorce. The libelee objected that a prior libel been filed by the libelant for the same cause of action, and after a hearing upon the merits was dismissed. The record in the first case being submitted to the court, it appeared on comparison that the allegations of the libel, the testimony, and the facts proved were substantially the same. Upon this showing, the libel was ordered dismissed.

By Court, **BELL, J.** The only question raised in this case is whether the undoubted principle of the law, that a judgment rendered between the same parties, for the same cause of action, upon a trial of the merits, before a court of competent jurisdiction, is conclusive between them, applies to the case of a decree rendered in a proceeding for divorce.

This point does not seem to us open to any doubt. The jurisdiction in cases of divorce *a vinculo matrimonii* is unknown to the common law, is conferred on the court by statute, and is exercised in modes unknown to the common law; still, the principle that a matter once decided by a competent tribunal binds the parties conclusively applies equally as to cases at common law. The operation of the rule is in no way limited by the character of the tribunal or its course of proceeding.

The case which perhaps more than any other may be deemed the leading case on this subject, *Duchess of Kingston's Case*, 11 How. St. Tr. 171, S. C., 2 Smith's Lead. Cas. 424, was directly upon the conclusive effect of a judgment in a case of jactitation of marriage in an ecclesiastical court of somewhat subordinate jurisdiction; and yet its effect as a judgment between parties was not questioned. The question was upon its effect when offered in evidence collaterally, upon an indictment for bigamy where the parties were necessarily different. The conclusiveness of such decrees is considered, discussed, and distinctly recognized upon an examination of many cases, in 2 Phill. Ev., c. 1, sec. 3; and 2 Id., Cowen & Hill's Notes, 57-83; 1 Greenl. Ev., secs. 528, etc.; *King v. Chase*, 15 N. H. 9 [41 Am. Dec. 675].

A secondary question may arise, which is, whether a decree that a libel for divorce be dismissed is conclusive against the

maintenance of any other libel for the same cause. And the answer to this question must depend upon the point whether such a decree, according to our practice, is necessarily a decree upon the merits. There are here usually no pleadings in the case even of contested libels. If objections are made to the libel itself, they are usually taken advantage of by a motion to dismiss the libel. So if the libelant is negligent in prosecuting his suit, the remedy is by a motion to dismiss for want of prosecution. Such motions are usually shown by the record; and where it appeared that the libel was dismissed without a final hearing upon the merits, upon such motion the decree of dismissal would have the effect of a judgment upon a motion to quash, or on a plea in abatement, or on a motion for a nonsuit, and would have no effect beyond the pending suit.

So the usual course of a party, who for any reason desires to abandon the further prosecution of his libel, is to move that it may be dismissed, which is usually done without any entry of his motion. In such a case, the entry "dismissed" is undistinguishable from the same entry made by order of the court upon a full examination of the evidence. The latter, as a decision upon the merits, is final; while the former, as a mere *non pros.*, is not evidence: 2 Phill. Ev., Cowen & Hill's Notes, 120.

To avoid the bar presumptively arising from such a decree, the party should see that the entry of his motion to dismiss be made on the record, or that the entry be made as in chancery cases, "without prejudice to any future proceeding:" 1 Daniell's Ch. Pr. 341, note.

Where no such entry is made, the papers on file will usually show whether the evidence was taken and finally submitted to the court, which would be strong evidence that the libel was dismissed on its merits. If, however, nothing appears, the party who alleges that the libel was dismissed on his own motion, or for any formal defect, or on any incidental question, should move an amendment of the record of the former case, so that the facts may appear. Such motion is allowed as of course upon proper notice and proof.

In the present case, it sufficiently appears that the first libel was decided upon its merits, and dismissed for defect of proof. The former decree is therefore a bar to this libel, which is therefore dismissed.

AMOSKEAG BANK v. MOORE.

[37 NEW HAMPSHIRE, 589.]

~~AGREEMENT~~ BETWEEN HOLDER AND INDORSERS OF PROMISSORY NOTE made before maturity thereof, for an extension of time of payment, constitutes a waiver on the part of the indorsers of demand and notice, converts their liability into an absolute guaranty, and renders them liable to pay, with or without a subsequent promise or demand upon the maker, at any time.

ASSUMPSIT. Defendants were indorsers of a promissory note signed by certain parties, payable to defendants or order in ninety days, with interest, and indorsed, "waiving notice." It appeared in evidence that the note in issue was discounted by plaintiff at the request of the indorsers, and that a few days before its maturity, through an agreement between the parties, the time of payment was extended sixty days; that no demand was made upon the makers, either at the maturity of the note or at the expiration of the time extended. Evidence was also offered of promises made by defendants to pay the note, subsequent to the expiration of the extended time of payment. Plaintiff had a verdict, subject to the opinion of this court as to whether the evidence in relation to the subsequent promise to pay the note was material.

S. N. Bell, for the plaintiffs.

Cross and Topliff, for the defendants.

By Court, **SAWYER, J.** The application made to the bank by the defendants, a few days before the maturity of the note, for an extension of the time of payment, and the arrangement which resulted, giving sixty days further time, furnished sufficient ground for the understanding on the part of the plaintiffs that demand of payment of the makers at the maturity of the note would be unnecessary. They must be supposed to have considered that it would be an idle step to demand payment in order to charge the indorsers, when the indorsers themselves had previously made an arrangement with the holders, assented to by the makers, as appears from their payment of the interest for the extended time, that payment should not then be made. The omission to make the demand is consequently to be attributed to this inference of the indorsers, and they cannot be permitted to assume the ground that they have obtained a discharge from their liability as indorsers by reason of the omission to make a demand which their own proceedings have rendered idle, and therefore unnecessary to be made. The ground upon

which a demand of the maker is held to be a prerequisite to the liability of the indorser is, that it is to be presumed that the maker has provided himself with funds to pay the note upon presentment at maturity, and the indorser should not be resorted to for payment until the maker, the party primarily liable, has had opportunity, by such presentment, to apply the funds provided for that purpose in satisfaction of the debt. But where the parties have agreed that payment shall not then be made by the maker, the occasion for presentment is removed. The indorsers, by their application for the extension, and the agreement which followed, have furnished the holders with a valid excuse for not making the presentment. This constitutes a waiver by them of demand and notice, precisely as if they had expressly indorsed with such waiver; and thereby the contingent character of their liability as indorsers, depending upon the demand of payment upon the maker, and notice of non-payment, is converted into one of an absolute character as of guarantors. Their liability being thus fixed and absolute at the maturity of the note, by reason of their indorsement and waiver of demand and notice, the fact that no demand was made at the expiration of the extended time is immaterial, as is also the evidence offered in relation to their subsequent promise to pay. The indorsement and waiver render them liable to pay, with or without a subsequent promise, and with or without a demand upon the maker at any time. The verdict may well be sustained upon this ground; and as nothing appears in the case tending to exonerate them from their liability, as indorsers who have waived demand and notice, there must be judgment on the verdict.

WAIVER OF DEMAND AND NOTICE by asking an extension of time: *Leffingwell & Pierpont v. White*, 1 Am. Dec. 97, and note 99, collecting a large number of authorities, among them the principal case. See also *Gore v. Vining*, 39 Id. 770, and note 772; *Lary v. Young*, 58 Id. 332.

THE PRINCIPAL CASE HAS BEEN CITED, and the rule there laid down has been adopted and followed, in *Airrey v. Pearson*, 37 Mo. 429; *Sheldon v. Horton*, 43 N. Y. 99; S. C., 53 Barb. 27.

CHESWELL v. CHAPMAN.

[38 NEW HAMPSHIRE, 14.]

RIGHT OF WAY.—UPON DIVISION OF DECEASED PERSON'S ESTATE, the committee appointed by the probate court may, where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares.

DEED GRANTING RIGHT OF WAY BY REFERENCE TO ACTUAL CONDITION OF PROPERTY, and the manner in which it was used by the owner at the time, is valid; and proof may be introduced to show what roads and passages were in use at the time of the conveyance.

VALID RIGHT OF WAY IN PASSWAYS AFTER PARTITION is created by probate court committee who assign to one share the "privilege to pass and repass to and from, in and around, the lands assigned to the other shares," in the usual passways.

RIGHT OF WAY IN PASSWAYS AFTER PARTITION OF DECEDENT'S ESTATE WILL BE LIMITED to such passways as were in existence and in a condition to be used at the time of the partition, and such as were marked on the ground by a distinguishable track, or otherwise so defined as to be fixed in a certain course. Such a right confers no authority to open passways formerly used, but discontinued and closed at the time of the partition.

PLEA, AFTER PARTITION, ALLEGING RIGHT OF WAY BY PRESCRIPTION IS INSUFFICIENT, although it refers to the immemorial usage of former proprietors, unless it contains a distinct averment that the passway existed and was in use, or in a condition to be used, at the time of the partition; and not leaves it to be inferred that it was closed and discontinued at that time. If defendant allege that it was necessary for him to remove fences or other obstruction in order to use the passway, he must also allege that the obstruction was placed there since the partition. Plea of usage in former times by owners of the whole land is of no importance, except as it may furnish evidence that there was a passway at the time of the partition.

ADMINISTRATOR'S DEED GIVES COLOR OF TITLE, though ANTERIOR PROCEEDINGS BE IRREGULAR, and establishes the grantee's right to the use and enjoyment of the land as against third persons who have no title.

RIGHT OF WAY IS APPURTENANT TO LAND, and the right to possession and use of land carries with it the right to use the way.

TRESPASS for breaking and entering the plaintiff's close on July 24, 1856. The following facts were set forth in defendant's plea: That defendant, in right of his wife, had been, and was still, seised of a freehold in a certain piece of land described in the plea; that one Paul Cheswell died seised of that tract, and of the plaintiff's close, leaving the plaintiff, with Hannah Cheswell and four others, his heirs at law; that those and other tracts of land constituted Cheswell's real estate, and his homestead farm; that on January 29, 1849, a committee was appointed by the judge of probate to make partition of Paul Cheswell's real estate among his heirs at law, and the committee, on April 24, 1849, made partition, and assigned to Hannah

Cheswell the tract of which the defendant was seised in right of his wife, "together with the privilege to pass and repass to and from, in and around, all of said premises, being the said estate of the said Paul Cheswell, in the usual passways to, over, and across the same;" that long before the time in the plaintiff's declaration mentioned, said Paul Cheswell, in his life-time, and all other occupiers of the said estate of Paul Cheswell, for the time being, did use and enjoy, from time whereof, etc., "a certain passway through and over said estate" (here follows a description of said passway); that the report of the committee was accepted, and the partition established in September, 1854; that Hannah Cheswell having died, her administrator, by license from the judge of probate, on April 8, 1856, conveyed the tract of land assigned to her in the partition of her father's estate to Nancy Chapman, then and still the wife of the defendant, with all the privileges, etc., which Hannah Cheswell had as appurtenant to the land; and that defendant, having entered under said deed, and being in occupation in right of his wife, and having occasion to use the said passway for the convenient occupation of his said land, entered into the plaintiff's close, and with his horse and carriage passed and repassed to and from his land, through and over the plaintiff's close in the said passway, etc., which was the same trespass, etc. The questions in the case arose on general demurrer to this plea.

Small, for the plaintiff.

Christie and Kingman, for the defendant.

By Court, PERLEY, C. J. The plaintiff takes the position that on partition of a deceased person's real estate by proceedings in the probate court, the court have no jurisdiction to create and annex to one share a right of way over land assigned to the other shares. The statute provides that the judge of probate "may cause the dower and share of the widow, and the shares of any or all the heirs or devisees in the real estate of any person deceased, or any part of it, and in the widow's dower after it shall have reverted, to be divided and assigned to them in severalty." No express authority is given to create and assign to any separate share a right of way or other easement in the remaining land; and no court in this state has express authority by statute upon proceedings in partition to give any such right. General authority is given to make partition in some cases upon application to the probate court, in

others to the supreme court, and if the power exists anywhere upon partition under the statutes to give a right of way, such as is set up in this plea, we can see no reason why it does not belong to the probate court upon division of a deceased person's estate.

The beneficial and convenient partition of real estate will often require that a right of way, or some other privilege or easement, should be given to one share in the parts assigned to other shares. This will be likely to happen most frequently in the assignment of dower; but dower is assigned by the judge of probate under the same general grant of authority which empowers him to make partition among heirs and devisees, and if such a right may be annexed to land assigned for dower, it undoubtedly may be to the share of an heir or devisee.

The authority to give such rights and privileges, especially to land assigned for dower, is believed to have been long and generally exercised by courts of probate in this state; and we think the authority is necessarily implied in the grant of jurisdiction to make partition and division of estates; because, in numerous cases, a judicious and convenient partition could not be made without it. In other jurisdictions, the power to create such rights and privileges, on partition by legal proceedings, has been often recognized: *Hoffman v. Savage*, 15 Mass. 130; *Davenport v. Lamson*, 21 Pick. 72; *Symmes v. Drew*, Id. 278; *Chandler v. Goodridge*, 23 Me. 78; *White v. Story*, 2 Hill (N. Y.), 549; *Pernam v. Wead*, 2 Mass. 203 [3 Am. Dec. 43]; *Russell v. Jackson*, 2 Pick. 574. We are therefore of opinion that the probate court, upon division of a deceased person's estate, may, in a case where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares.

The committee, in this case, undertook to give the share assigned to Hannah Cheswell "the privilege to pass and repass to and from, in and around, all the said premises, being the said estate of said Paul Cheswell, in the usual passways, to, over, and across the same." The terms used are somewhat loose and indefinite. It would doubtless have been better, and might have prevented the present dispute between these parties, if the committee had fixed and limited the right more clearly and distinctly. It would not, however, seem to be any legal objection to the grant of such a right by a conveyance, that it is described by reference to the actual condition of the

property, and the manner in which it was used by the owner at the time. Proof may, in such case, be introduced to show what roads and passes were in use at the time of the conveyance: *Atkins v. Bordman*, 2 Met. 462 [37 Am. Dec. 100]; *Salisbury v. Andrews*, 19 Pick. 258. In *Davenport v. Lamson*, 21 Id. 72, by the report of a committee appointed to make partition in the probate court, "each partitioner was to have the privilege of passing and repassing across each other's shares, as before the division;" and it appears to have been taken for granted that the privilege described in those terms was legal and valid; and we are of opinion that a valid right of way was in the present case created and annexed to the share of Hannah Cheswell, by the partition in the probate court.

But we think that the right must, in construction, be limited to such passways as were in existence and in use, or in a condition to be used, at the time of the partition, and such as were marked on the ground by a distinguishable track, or otherwise, so defined as to be fixed in a certain course. If, under this partition, the claim were set up to go back and inquire what passways had been used by the owner in former times, and to insist on going over the land wherever it had been usual for him to go, though no such passways were in use at the time of the partition, the claim would be likely to raise questions of fact difficult to settle by proof, and, if admitted, the claim might be extremely inconvenient and injurious to the owner of the land. We cannot think that the intention was to give a right of a character so uncertain and unreasonable.

It is to be observed that the right given in the terms of the report is not the passways themselves, but the privilege to pass and repass in the usual passways. The term "passways" is evidently used to fix and limit the place and line in which the privilege of passing and repassing is to be exercised; and to constitute a passway, within the meaning of the report, there must have been something on the ground at the time of the partition to fix the route with reasonable certainty in one course and track. No right, we think, is given to go over the land wherever the owner in former times had been accustomed to go in different directions, as the shifting use and cultivation of the land might make it convenient for him; no right to open passways formerly used, but discontinued and closed at the time of the partition.

It would have been, perhaps, sufficient, if the plea, after stating the proceedings in the probate court, had alleged generally

that at the time of the partition there was, and long before had been, a usual passway, leading from the land assigned to Hannah Cheswell over the land of the plaintiff, as is the common form of pleading a right of way claimed by prescription: 2 Ch. Pl. 576. In that case, if issue were taken on the plea, it would be left for the evidence to show on trial whether there was a passway within the term as used in the report of the committee. The court would then be called on at the trial to give the rule of law which governed the question, as it was raised on the evidence, which would be safer than an attempt to anticipate the facts and lay down a particular rule in advance. The defendant has in this instance undertaken in his plea to state facts which would constitute such a passway as he is entitled to under the partition; and we think he has failed to do it.

The plea describes the right as if it were claimed by prescription, and refers to the immemorial usage of former proprietors. But here could be no prescriptive right; no adverse claim of a right in land of another. The right had no existence until it was created by the partition. The usage in former times, by former owners of the whole land, is of no importance except as it may furnish evidence that there was a passway at the time of partition. The plea contains no general allegation that there was a passway in use, or in a condition to be used, at the time of the partition; nor does it set out any monuments or marks on the ground to show that there was a passway established in the course where the defendant entered and passed. We cannot know, as matter of fact on this demurrer, what the real dispute is between these parties; but the plea alleges that it was necessary for the defendant to remove a fence in order to use the passway, and does not allege that the fence was placed there since the partition. This, with the statement of immemorial usage by former proprietors, and the want of any distinct averment that the passway was in existence at the time of the partition, leads to the suspicion that a question may have arisen as to the right of opening and using a passway which was discontinued and closed at the time of the partition. We think that the defendant has no such right, and that his plea should contain a distinct averment that the passway existed and was in use, or in a condition to be used, and not leave it to be inferred that it was closed and discontinued at the time of the partition; and for this cause the plea is insufficient.

The objection to the administrator's sale cannot prevail. The plaintiff, having no title to the defendant's land, is not in a situation to make the objection; for the deed of the administrator, though the antecedent proceedings may have been irregular, gave color of title; and the plea alleges that the defendant entered and was in possession under the deed. This is sufficient to establish his right against third persons who have no title. The right of way is appurtenant to the land, and his right to the possession and use of the land carries with it the right to use the way.

Demurrer allowed.

RIGHT OF WAY IS NOT INCIDENT TO GRANT, unless there be an actual necessity, and not a mere inconvenience: *Screen v. Gregory*, 64 Am. Dec. 747, and note 749, collecting the cases showing when a way by necessity will be created by implication: See also *Brigham v. Smith*, Id. 76, and note 77, in which it is said that a way of necessity appurtenant to land passes with a grant of the land. As to what easements will pass as incident to land conveyed, see *Morgan v. Mason*, 55 Id. 464, and cases cited in note thereto 472. The subject of easement of way is discussed, and many authorities cited, in the note to *Elliott v. Rhett*, 57 Id. 766. Perpetual right of way is a subject of grant, and not of license, and can be conveyed at law only by deed or prescription: *Foster v. Browning*, 67 Id. 505.

THE PRINCIPAL CASE WAS CITED in *Chenell v. Chapman*, 42 N. H. 52, where the court said that the instructions to the jury which were objected to were so nearly in the words of the opinion pronounced in the principal case, and in the words of the pleadings, that they saw no reason to change them. It was also cited in *Carpenter v. Dalton*, 58 Id. 616, to the point that although an administrator's conveyance be made without license, yet if the administrator be in possession, his deed will give color of title, and is sufficient to establish the grantee's right against all who have no title.

WHITTON v. WHITTON.

[88 NEW HAMPSHIRE, 127.]

ONE TENANT IN COMMON CANNOT, AS AGAINST HIS CO-TENANTS, CONVEY part of the common property in severalty by metes and bounds, or even an undivided share of such part.

LEVY UPON CO-TENANT'S INTEREST IN PART OF LAND HELD IN COMMON IS VOID as against the other co-tenants.

TENANT IN COMMON CANNOT BY WILL DEVISE HIS INTEREST in specific parts of the common property so as to prejudice his co-tenants.

DEVISE OR CONVEYANCE OF GRANTOR'S INTEREST IN SEVERAL PARTS OF COMMON PROPERTY IS VALID between the devisees or grantees, though it is inoperative as to the other co-tenants.

PARTIES TO BILL FOR PARTITION.—If owner of undivided interest in real estate devise his interest in part of the land to one and in another part to another, both devisees are proper parties to a bill for partition.

- MORTGAGEES ARE NOT GENERALLY NECESSARY PARTIES TO BILL FOR PARTITION;** but it is proper to join them where their interests may be impaired. Thus where a tenant in common grants or devises his interest in specific parts of the common property, a mortgagee of the interest of one of such grantees or devisees may be properly made a party to a bill for partition; because his whole security is liable to be destroyed by an assignment of the mortgaged part to the other co-tenant.
- IF CONDITION OF MORTGAGE IS TO INDEMNIFY MORTGAGEE AGAINST SUPPORT OF THIRD PERSON,** it is a sufficient breach that the mortgagee was compelled to pay for such support for a part of the time.
- CONDITIONS WHICH INURE TO DEFEAT ESTATE ARE CONSTRUED STRICTLY. FORFEITURES ARE NOT FAVORED IN EQUITY.**
- PARTY WHO CLAIMS TITLE DERIVED FROM NON-PERFORMANCE OF CONDITIONS SUBSEQUENT IS BOUND TO SHOW** his title complete and perfect. No presumptions will ordinarily be made in his favor; and if he has defeated or prevented the performance by any act or omission of his own, he must fail. He must therefore show that he has done all that he is bound to do, to entitle himself to the performance of the condition.
- ONE BOUND TO PERFORM CONDITION MUST DO IT AT HIS PERIL,** as a general rule, and the other party is not bound to do anything.
- CONDITION IS NOT BROKEN** if by its terms it is made the duty of the other party to do any act before the condition is to be performed; such as to give notice of any fact, or to make a demand, etc., and he fails to do it.
- IN PLEADING BREACH OF CONDITION, WHERE PARTY NOT MAKING SUCH CONDITION IS BOUND TO DO ANY ACT** before the condition is to be performed, he must aver the performance of such act, with the time, place, etc., when these are material, or his title will be deficient.
- LAW WILL SOMETIMES IMPLY CERTAIN THINGS TO BE DONE BEFORE CONDITION IS BROKEN,** where there is nothing in the terms of the condition which requires the party who claims the benefit of it to do anything; because it would otherwise be out of the power of the other party to perform it. This implication arises from the nature of the contract itself; and in such cases the effect of a neglect to do anything thus implied is the same as if it was expressed.
- ACT IMPLIED MUST BE DONE, AND ITS PERFORMANCE ALLEGED AND PROVED,** or the party claiming the benefit of a condition can take no advantage of its supposed breach.
- LAW IMPLIES THAT NOTICE WILL BE GIVEN WHERE CONDITION DEPENDS ON ACT OF PERSON CLAIMING ITS BENEFIT,** of every material circumstance connected with it which is within his peculiar and personal knowledge, or which depends on his choice, and where the other party has no means, or no reasonable means, of arriving at that knowledge except from the party himself.
- LAW DOES NOT IMPLY THAT NOTICE WILL BE GIVEN WHERE CONDITION DEPENDS ON ACT OF THIRD PERSON;** and the party who is bound to perform is bound to take notice of such act.
- NO NOTICE IS REQUIRED TO BE GIVEN OR AVERRED WHERE PERFORMANCE OF CONDITION DEPENDS** on anything to be done by the party entitled to the performance to or with any third person who is distinctly named or designated, or by any such third person to or with him, though it is apparent that what is done is more properly and particularly within the knowledge of the party entitled to the performance; because the one bound to perform may obtain knowledge of it otherwise than from him, and he is bound to take notice of it at his peril.

NO NOTICE NEED BE ALLEGED THAT MORTGAGEE, in a mortgage conditioned to indemnify the mortgagee against the support of a third person, has been compelled to pay, because the other party has the means of knowing whether he has paid or made provision for the support of such person independently of the mortgagee.

WHENEVER "ACTUAL REQUEST" IS NECESSARY TO BE STATED, GENERAL AVERTMENT "THOUGH OFTEN REQUESTED" is not sufficient. Such request, if essential to the breach, is so also as to the right of action; and it must therefore be specially alleged whenever such request is, either by the terms or nature of the contract, the condition of the liability.

PARTY MUST REQUEST PERFORMANCE OF CONDITION where it in any way depends on the pleasure of the party bound in what manner or at what time a thing shall be done, or whether it shall be done at all.

SPECIAL REQUEST TO PERFORM EXPRESS CONDITION IS UNNECESSARY, unless it is so expressed in the contract.

BILL filed by the complainant, Daniel Whitton, and in which it was alleged that Jesse Whitton, his father, then deceased, was seised in fee of one undivided half of a farm in Wolfborough, bounded, etc., in common with his other son, Jesse Whitton, jun., then deceased, who was seised of the other half thereof in fee; that Jesse and Jesse, jun., occupied the same as tenants in common until the death of Jesse, jun., December 9, 1854; that Jesse Whitton, jun., devised to his son, Joseph J. Whitton, his part of a certain field in the north-west corner of said farm, containing three acres, and the remainder of his part of said farm to his son, Henry A. Whitton; that Jesse Whitton, on December 16, 1854, conveyed to the complainant his undivided half of said farm, and took from him a bond conditioned for his support and maintenance during life; that on the same day the complainant conveyed to Henry A. Whitton the same premises by a deed with a condition as follows: "Provided said Henry A. shall in all things indemnify and save harmless me and my heirs, etc., for the support of my father, Jesse Whitton, agreeably to a bond signed by me this day, then this deed to be valid, otherwise void;" that on April 7, 1855, Henry A. conveyed by mortgage deed all his part of the farm to Thomas L. Whitton; that Henry A. had failed to perform the conditions of the complainant's deed to him; that he had not indemnified and saved complainant harmless for the support of said Jesse Whitton; but that complainant himself had been compelled to pay, and was holden to pay, for such support and maintenance from September 4, 1855, until the death of said Jesse Whitton, on October 17, 1857, the sum of six hundred dollars. The bill further alleged that said Henry A., though requested, had not paid the complainant said sum, or any part

of it, but refused so to do; that the condition of said bond was broken, and the deed rendered void; and that before filing this bill he publicly entered upon said premises for breach of said condition, and was seised of one undivided half of said farm in common with said Henry A. and Joseph J., as devisees of Joseph Whitton, jun. Further, that the enjoyment of the premises in common was liable to difficulties; that complainant had applied to said Henry A. and Joseph R., and requested them to join him in making a fair and equal partition, etc., but that they refused, etc. The bill prayed subpoenas to Henry A., Joseph J., and Thomas L.; and that a commission might issue to divide said premises into two equal parts; one of them to be assigned to the complainant, the other to Henry A. and Joseph J., according to their interests, etc. The defendants jointly and severally demurred, for cause that the bill, if true, which was not admitted, did not contain any matter whereon the court could ground a decree, or give the complainant any relief.

Z. Bachelder, for the defendants.

Charles F. Hill, for the plaintiff.

By Court, BELL, J. One tenant in common cannot, as against his co-tenants, convey a part of the common property in severalty by metes and bounds, or even an undivided share of such part: *Jeffers v. Radcliffe*, 10 N. H. 246; *Great Falls Co. v. Worster*, 15 Id. 449. And a levy upon the co-tenant's interest in a part of the land held in common would be equally void against the other co-tenants: *Peabody v. Minot*, 24 Pick. 332; *Blossom v. Brightman*, 21 Id. 284; *Smith v. Benson*, 9 Vt. 140 [31 Am. Dec. 614]; *Starr v. Leavitt*, 2 Conn. 243 [7 Am. Dec. 268]; *Hinman v. Leavenworth*, Id. 244, and note; *Thompson v. Barber*, 12 N. H. 563. The reason is obvious. His title is to an undivided share of the whole; and he is not authorized to carve out his own part, nor to convey in such a manner as to compel his co-tenants to take their shares in several distinct parcels, such as he may please: *Great Falls Co. v. Worster*, 15 Id. 449; and his grantee can have no greater rights in this respect than himself. Upon the same principle, the tenant in common cannot, by his will, devise his interest in specific parts of the common property, so as to prejudice his co-tenants. So far as it may impair their rights, a devise as well as a deed must be inoperative and voidable. It does not follow, however, from this principle, that the grantee or devisee may not be properly a

party to a bill or petition for partition. Devisees generally, and grantees sometimes, may claim under the same title, or a title of the same date; and as in such case neither has priority, it is impossible to say which should not be a party, if either should be rejected. In this case, Joseph J. Whitton and Henry A. Whitton are devisees in the same will; each is a devisee of a specific part of the common property—Joseph of three acres, and Henry of the residue. If either should not be a party, then neither should be, and as they together have the whole, no partition could be had against any one. But though the deed or devise in such case is inoperative and void so far as it impairs the right of the co-tenant, yet as against him and others, for all other purposes, such grant or devise is valid, and the grantee or devisee is to be regarded as owner. He has an interest in the question whether the property shall be divided, and if so, in what manner, precisely so much greater than an ordinary tenant in common, as he is liable to have his entire interest assigned to another in the partition, and his whole estate defeated, without redress or compensation. It seems, therefore, clear that Joseph J. Whitton was properly made a party defendant to the bill.

It is by no means clear that Thomas L. Whitton is not properly made a defendant. It has been held elsewhere that a mortgagee is not a necessary party to a bill for partition: 1 Ch. Eq. Dig., Est., vii., 3; Id., Pl., v., 16; *Whitney v. McKinney*, 7 Johns. Ch. 146; and in New York that judgment creditors are not necessary or proper parties in a partition: *Sebring v. Mercereau*, 1 Hopk. 510; and the same doctrine has been extended there to mortgages and other incumbrances upon an undivided interest: S. C., 9 Cow. 344; *Harwood v. Kirby*, 1 Paige, 470. Here the mortgagee has a direct interest, since the partition may seriously affect or impair his security. If his mortgage were of the three acres of Joseph J. alone, it will be seen that the whole of that parcel might be assigned as part of the complainant's share, and thus the mortgagee's security might be wholly extinguished. We think the rule cannot be well extended further than that mortgagees are not generally necessary parties to a partition, but that they may be joined where their interests may be impaired: 1 Daniell's Ch. Pr. 327; and *Swan v. Swan*, 8 Price, 518, there cited. It may well be doubted if a mortgagee would be bound by a partition in equity, where he is not made a party, and by the partition his security was destroyed or impaired, upon the ordinary principles on which

mortgagees are required to be made parties to bills of foreclosure: 1 Daniell's Ch. Pr. 325.

The provisions of our statute relative to petitions for partition seem entirely decisive of the propriety of making Thomas L. a party in this case. "Application may be made, etc., by petition in writing, particularly describing the estate of which partition is desired, the names of the owners, or persons interested, if known." Not merely the names of the owners in common, but all persons interested are to be set forth: *Morrill v. Foster*, 25 N. H. 336. What the statute requires in the statutory proceeding can hardly be deemed unfit in a petition in equity.

It is said the condition of the plaintiff's deed to Henry A. is not forfeited. The allegations of the bill are, that the plaintiff conveyed his share of the land to Henry, subject to a condition to indemnify and save him harmless for the support of his father, agreeably to a bond referred to; that Henry has failed to fulfill this condition, has not indemnified and saved him harmless, but the plaintiff has had to pay and is holden to pay six hundred dollars for his support; and Henry, though requested, has not paid that sum, but refuses. At first look, this seems a good condition and a breach well alleged. The objection is, that it is not shown that the plaintiff supported his father, agreeably to the condition of the bond, and that the support furnished covered the whole time. That is immaterial. It is not alleged that there was any breach as to the time omitted. If Henry performed the condition for nine months, he was equally bound to perform it after that, and a forfeiture followed the neglect of duty for any part of the time. If the complainant was bound to support his father, and caused it to be done to his satisfaction, Henry cannot complain.

It is objected that the plaintiff was bound to give notice of the amount he paid, or was liable to pay, and it is not alleged that he did so; and consequently no breach of the condition is shown. Conditions which inure to defeat an estate are construed strictly: 8 Co. 179; Co. Lit. 205, 218, 219. Forfeitures are not favored in equity. The party who claims a title derived from the non-performance of a condition subsequent is bound to show his title complete and perfect. No presumptions are ordinarily to be made in his favor: *Livingston v. Tompkins*, 4 Johns. Ch. 415 [8 Am. Dec. 598]; 4 Kent's Com. 130; 2 Cru. Dig. 35, sec. 29. If he has defeated or prevented the performance by any act or omission of his own, he must fail. He must therefore show that he has done all that he is

bound to do to entitle himself to the performance of the condition: 2 Cru. Dig. 33, sec. 26; Com. Dig., tit. Condition, L, 4-9.

Generally, the party who is bound to perform a condition must do it at his peril, and the other party is not bound to do anything; but if by the terms of the condition it is made the duty of the party to do any act before the condition is to be performed—as to give notice of any fact, or to make a demand, or the like—and he fails to do it, the condition is not broken. And if, in pleading, in any such case, the party fails to aver the performance of such act, with the time, place, etc., when these are material, his title will be deficient: Com. Dig., tit. Pleader, C, 69, 73; Condition, 10, 11; Gould's Pl., c. 4, sec. 15; *Birks v. Trippet*, 1 Saund. 33, note 2.

In many cases, there is nothing in the terms of the condition which requires the party who claims the benefit of it to do anything; and yet the law implies, from the nature of the contract itself, that certain things must be done by him before the condition is broken, because it would otherwise be out of the power of the other party to perform it; and in such cases the effect of a neglect to do anything thus implied is the same as if it was expressed: *Watson v. Walker*, 23 N. H. 491. The act implied must be done and its performance alleged and proved, or the party can take no advantage of the supposed breach of the condition: Gould's Pl., c. 4, sec. 15; Archb. Civ. Pl. 102. And it is in this view that the questions of notice and request are material in this case.

As to the first of these, the law implies that the parties must have agreed or intended that notice should be given by the party entitled to the benefit of a condition, of every fact necessary for the other party to know, to enable him to perform the condition, and of every material circumstance connected with it which is within his peculiar and personal knowledge, or which depends on his choice, so that the other party has no means, or no reasonable means, to arrive at that knowledge except from the party himself. But where the condition depends on any act of a third person, no notice is implied, and the party who is bound to perform is bound to take notice of such act. In the class of cases where the performance of the condition depends on anything to be done by the party entitled to the performance, to or with any third person, who is distinctly named or designated, or by any such third person to or with him, though it is apparent that what is done is more

properly and particularly within the knowledge of the plaintiff, yet, because the defendant may obtain knowledge of it otherwise than from him, notice is not required to be given nor averred; for the party who is bound must take notice of it at his peril: *Dix v. Flanckers*, 1 N. H. 427; *Watson v. Walker*, 23 Id. 491; and see *Lent v. Padelford*, 10 Mass. 238 [6 Am. Dec. 119]; *Hobart v. Hilliard*, 11 Pick. 144; *Farwell v. Smith*, 12 Id. 87; *Clough v. Hoffman*, 5 Wend. 500; *King v. Holland*, 5 T. R. 621; *Cutler v. Southern*, 1 Saund. 116, note 2; *Hodsden v. Harridge*, 2 Id. 62 a, note 4; see also Vin. Abr., tit. Condition, A, (d); B, (d), Notice, 1-5; Com. Dig., tit. Condition, L, 8-10; Pleader, C, 73-75; Archb. Civ. Pl. 102-104, where the ancient cases are collected.

In this case, the condition of the conveyance was "to indemnify and save harmless the plaintiff for the support of his father, Jesse Whitton, agreeably to his bond," etc.; and the question is, whether the facts on which the performance of the condition depends are so peculiarly within the plaintiff's knowledge, and so far beyond any reasonable means of knowledge of the defendant, that the law will imply that notice must be given to enable the defendant to perform his contract. And it seems to us that the defendant had ample means to ascertain all he needs to know in order to perform his contract, within the rule before stated. He might indemnify the plaintiff by furnishing himself the necessary support for Jesse Whitton, or by procuring others to furnish it; as that would be his own act, he would be bound to notice that he had not done it. He might indemnify him by paying to him the amount he was liable to others for Jesse Whitton's support, and any damages. And it must always be in his power to ascertain from Jesse Whitton himself whether he was supported by the plaintiff or on his credit. The value of such support could not, in the nature of things, be a secret of the plaintiff's. In this view we are sustained by the cases of *Sanborn v. Woodman*, 5 Cush. 41, where the grantees were bound to indemnify the demandant from the payment of the principal and interest of a certain mortgage, and on demand of the assignee of the mortgage the demandant paid the interest, and entered for condition broken, and it was held he was not bound to give notice, or to demand repayment of the interest; *Duffield v. Scott*, 3 T. R. 374, where, on a covenant to indemnify the plaintiff against debts of his wife, it was held he was not bound to give notice of a demand on him for such

a debt; *Cutler v. Southern*, 1 Saund. 116, where, on a bond to save harmless and indemnify the plaintiff against all damages from one Cook, it was held the obligor was bound to take notice of the act of a stranger, as Cook was; *Ker v. Mitchell*, 2 Chit. 487, where, on a bond to save a party harmless from all actions, costs, etc., which might be the consequence of A's delivering to the defendant a bill of exchange, to part of which a third person was entitled, it was held forfeited by payment to the third person of his share, on his demand of it, though no notice of the payment was given to the defendant; and *Clough v. Hoffman*, 5 Wend. 499, where a partner, who had covenanted to pay all the company debts, was held liable to his copartner, who had been called upon to pay and had paid such a debt, without notice of the debt, or action, or payment.

Whenever an actual request is necessary to be stated, the general averment "though often requested" is not sufficient. Such request, if essential to the breach, is so also as to the right of action; and it must therefore be specially alleged (Gould's Pl., c. 4, secs. 5-16) wherever such request is, either by the terms or nature of the contract, the condition of the liability: Ch. Pl. 323; *Birks v. Trippet*, 1 Saund. 33, note 2; 1 Saund. Pl. & Ev. 131.

By the terms of this condition, no request was necessary. The only question is, if a request is necessary by implication of law from the nature of the contract. Where it any way depends on the pleasure of the party in what manner or at what time a thing shall be done, or whether it shall be done at all, the party must request performance of a condition: Com. Dig., tit. Pleader, C, 69. That is not this case, and I have found no other case where a special request is held necessary, unless it is so expressed in the contract.

Upon these views, the demurrer must be overruled.

ONE CO-TENANT CANNOT CONVEY HIS INTEREST in the common property, by metes and bounds, to a stranger: *Porter v. Hill*, 6 Am. Dec. 22, and note 24, discussing the subject; *Varnum v. Abbot*, 7 Id. 87; *Hyde v. Stone*, 18 Id. 501; *Jewett's Lessee v. Stockton*, 24 Id. 594, and note 597; *Dennison v. Foster*, 34 Id. 429; *Mussey v. Holt*, 55 Id. 234. The deed of one co-tenant cannot affect the title or interest of his other co-tenants, whatever title such deed may purport to convey: *Bigelow v. Topliff*, 60 Id. 264. And a conveyance, by metes and bounds, of a portion of the common estate, by one co-tenant, is void, and not merely voidable at the election of the other co-tenants: *Duncan v. Sylvester*, 41 Id. 400, and note 406. But the doctrine that one co-tenant cannot convey his interest in the common estate by metes and bounds is not maintained in the majority of the decisions on this subject: See note to *Porter*

v. *Hill*, 6 Id. 24, discussing the subject; Freeman on Co-tenancy, sec. 193. Although a conveyance by one co-tenant of a part of the land by metes and bounds to a stranger, whether the conveyance be by deed or by levy of an execution, can have no legal effect to the prejudice of another co-tenant; yet such a conveyance will operate as an estoppel against the grantor and those claiming under him: *Varnum v. Abbot*, 7 Id. 87. So whether a co-tenant can convey his share in a particular part of the estate by metes and bounds is a controverted question. That he may, see cases cited in note to *Porter v. Hill*, 6 Id. 22; *In the Matter of Ebenezer Prentiss*, 30 Id. 203. That such a conveyance is void, see *Jewett's Lessee v. Stockton*, 24 Id. 594. Conveyances by metes and bounds or in severalty, by one of several co-tenants, and their validity and effect, are considered in Freeman on Co-tenancy and Partition, secs. 199-288. As to conveyance of undivided interest in part of co-tenant's interest, see note to *Phillips v. Tudor*, 69 Id. 307.

LEVY OF EXECUTION UPON PART OF INTEREST OF ONE CO-TENANT: See *Smith v. Benson*, 31 Am. Dec. 614, and note 616; *Varnum v. Abbot*, 7 Id. 87; note to *Porter v. Hill*, 6 Id. 24.

DEVISEE OF UNDIVIDED PART OF TRACT OF LAND MAY RECOVER to the extent of the undivided interest before partition: *Young v. Adams*, 58 Am. Dec. 654.

IN PARTITION SUIT, ALL PERSONS INTERESTED ARE NECESSARY PARTIES: *Batterton v. Chiles*, 54 Am. Dec. 539; and in such a suit, the court ought not to adjudicate and dispose of the subject-matter unless all the real parties in interest are before it: *Portis v. Hill*, 65 Id. 99. A co-tenant against whom partition is demanded has been held not to be strictly a party to the proceeding: *Lessee of Pillsbury v. Dugan's Adm'r*, 34 Id. 427; but in the note thereto 429, it is shown that mortgages of a co-tenant are not bound by a decree of partition against him, unless they are parties to the suit.

CONDITIONS SUBSEQUENT, WHAT ARE—EFFECT OF BREACH THEREOF: *Leach v. Leach*, 58 Am. Dec. 642; *Fisk v. Chandler*, 50 Id. 612; *Spofford v. True*, 54 Id. 621; *Keller v. Johnson*, 71 Id. 355. This subject is elaborately discussed in the extended note to *Cross v. Carson*, 44 Id. 742-759, on when, how, and at whose instance a deed may be avoided for breach of condition subsequent. This note touches upon several points of the *syllabus supra*.

CONDITIONS SUBSEQUENT ARE STRICTLY CONSTRUED, and not favored because they tend to defeat estates: See note to *Cross v. Carson*, 44 Am. Dec. 744, and numerous cases there cited; note to *Coppage v. Alexander's Heirs*, 38 Id. 160; *Taylor v. Sutton*, 60 Id. 682.

BREACH OF CONDITION TO SUPPORT GRANTOR OR TO PAY HIS DEBTS, WHAT CONSTITUTES: See *Pownall v. Taylor*, 34 Am. Dec. 725; extended note to *Cross v. Carson*, 44 Id. 750; *Jackson v. Topping*, 19 Id. 515.

BREACH OF CONDITION "TO INDEMNIFY AND SAVE HARMLESS" the grantor against mortgage, etc.: See note to *Cross v. Carson*, 44 Am. Dec. 750, 754; *Michigan State Bank v. Hastings*, 41 Id. 549.

FORFEITURES ARE NOT FAVORED IN EQUITY. On the contrary, relief will be granted against them when it can be done without violating the contract rights of the parties: *Hall v. Delaplaine*, 68 Am. Dec. 64; extended notes to *Smith v. Mariner*, Id. 85-88, treating of relief in equity against forfeitures; *Cross v. Carson*, 44 Id. 744, 746, 749, 757; *Leach v. Leach*, 58 Id. 642.

CONDITION OF INDEMNITY BOND, WHEN BROKEN: *Jones v. Cooper*, 16 Am. Dec. 678.

BOND CONDITIONED TO ACCOUNT "WHEN THEREBY REQUESTED" constitutes the request a part of the condition, and in assigning a breach, such request must be averred, and the time and place specified: *Jones v. Cooper*, 16 Am. Dec. 788. Breach of official bond may be assigned negatively: *Governor v. White*, 24 Id. 763.

PLEADING NOTICE: See *Austin v. Richardson*, 2 Am. Dec. 543; *Lent v. Padelford*, 6 Id. 119; *Rapelye v. Bailey*, 8 Id. 199.

THE PRINCIPAL CASE WAS CITED IN *Ballou v. Hale*, 47 N. H. 350, to the point that the conveyance by one tenant in common of a part of the land by metes and bounds is not valid as against the other tenant in common, unless his assent to it is manifested by some proper act.

STATE v. RICHARDSON.

[86 NEW HAMPSHIRE, 203.]

OWNER OF PERSONAL PROPERTY HAS NO RIGHT TO RESIST OFFICER who attempts in good faith to attach it upon process against a third person, although such resistance be necessary to protect the property from being taken by the officer.

IT IS NO DEFENSE TO INDICTMENT FOR RESISTING OFFICER IN SERVING WRIT OF ATTACHMENT that the property did not belong to the individual against whom the process was issued, but to the defendant, who made only sufficient resistance to prevent his property from being taken into the officer's custody.

INDICTMENT charging respondent with having resisted a duly qualified officer in the service of a certain writ of attachment, the same being a lawful process in a civil case. The government offered evidence tending to prove that the officer, Willis, believed a certain horse, which he was directed to attach, to be the property of the defendant named in the writ of attachment described in the indictment, and was attempting to attach and in the act of taking said horse, when he was assaulted and obstructed by the respondent, who knew that he was duly appointed and authorized to serve said writ. The respondent then offered to prove in justification of said assault and obstruction that he was the owner of the horse which Willis was engaged in attaching, and that whatever assault was made and obstruction interposed by him were made and interposed in defense of his property in said horse, and were necessary to protect the same from being taken by said Willis. But this evidence was rejected, and a verdict of guilty was taken by consent. Upon this verdict judgment was to be rendered, or the same to be set aside and a new trial granted, according to the opinion of the whole court as to the admissibility of the rejected evidence.

H. Hibbard, for the defendant.

Sullivan, attorney-general, and *C. W. and E. D. Rand*, for the state.

By Court, FOWLER, J. In *State v. Fifield*, 18 N. H. 34, decided in this county by the superior court, December term, 1845, the precise question raised in the present case was considered and settled. The respondent there was indicted for obstructing a deputy sheriff in the removal of certain personal property which he had attached as belonging to one Page, on a writ against him, and which was lying at a mill occupied by Page. The respondent offered to show in evidence upon the trial that the property attached was his own, having been previously assigned to him by Page; and that he used no more force than was necessary to retain the property in his own possession, and prevent the officer from taking it away. The court, being of opinion that if shown these facts would constitute no defense, rejected the testimony offered, and a verdict of guilty having been rendered, the case was transferred on exceptions to this ruling, and to the form and allegations of the indictment.

After disposing of the objections taken to the indictment, by overruling them, Woods, J., in delivering the opinion of the court, says: "The last exception to be considered is that which was taken to the exclusion of the evidence offered by the defendant to prove that the goods were his own, and not the goods of Page, against whom the process was, and whose property it required the officer to take.

"The good faith and lawful purpose of the officer, in seizing the goods in controversy, are implied in the verdict, which establishes the fact that he was resisted in the service of the process; so that the question presented is, whether an officer who, in the service of a process against one, and intending to serve it, attempts to take property which belongs to another, may lawfully be resisted by the latter with such force as shall suffice to enable him to retain possession of his own."

After adverting to the conflicting decisions of the supreme courts of Massachusetts and Vermont on this question, as found in the cases of *Commonwealth v. Kennard*, 8 Pick. 133, and *State v. Downer*, 8 Vt. 424 [30 Am. Dec. 482], analyzing the reasoning of the two tribunals, and illustrating at some length the correctness of the principle maintained in *State v. Downer*, *supra*, the learned judge proceeds: "The obvious tendency of

the doctrine for which the defendant contends [that asserted by the supreme court of Massachusetts in *Commonwealth v. Kennard*, 8 Pick. 133], to promote disturbances of the peace by emboldening parties otherwise sufficiently disposed to be strenuous in cases of doubt, and to appreciate in such cases the benefits of actual possession and present use of the disputed goods, suffices of itself to awaken the greatest doubt of its soundness.

"It is true that the owner of goods, in possession of them, may in general resist a trespass designed to take them from his possession. It is also true that the seizure of the goods of one person upon process against another is technically a trespass, for which the law has provided the same remedy as for the wanton aggression of a stranger, without color or excuse. But it does not necessarily follow that the two acts may not be distinguished in the particulars under consideration. For one, preventive force is often the only protection; for the other, the law has provided remedies so perfect as to take away all excuse and all strong necessity or reasonable temptation for the exertion of such force.

"Indeed, in every aspect in which we have been able to consider the question, we are unable to find those reasons for doubting which the conflict of high authorities might induce us to expect, and are decidedly of opinion that the defense which the defendant offered was rightly rejected at the time, and that there must be judgment on the verdict."

The doctrine of *State v. Downer*, *supra*, which was thus approved and confirmed by our own court, has been reaffirmed by the supreme court of Vermont in *State v. Miller*, 12 Vt. 437, in *Merritt v. Miller*, 13 Id. 416, and in *State v. Buchanan*, 17 Id. 573; and commends itself to our judgment as the only sound and reasonable rule of law in the premises. To hold that an officer duly qualified, and known to be so, may be resisted with impunity while proceeding in good faith to attach property which he is directed to attach, and indemnified for attaching as the property of the defendant in the process he is executing, by any person claiming to own that property, would impose upon every officer the necessity of investigating and deciding correctly at his peril every controversy in relation to the ownership of property shown to him as belonging to the debtor, before he could safely act. It is unnecessary to say how utterly impracticable and impossible this would be. No man who regarded his personal safety or pecuniary interests

would venture to attach personal property the title of which was in controversy, if such a rule were established and generally understood and practiced upon by the community. Besides, there is no occasion for such a rule. If the property of one person is taken upon a writ or execution against another, the law affords ample means of redress by a writ of replevin, an injunction, or other proceedings, without the owner's taking the law into his own hands. There is no such sacredness attached to personal property as can justify, in its defense, resistance to an authorized officer of the law, acting in good faith under lawful process.

As the question before us was distinctly settled in *State v. Fifield*, 18 N. H. 34, in accordance with our convictions of what the true rule of law should be on this subject, the exceptions taken to the ruling of the court below, in precise conformity with that decision, must be overruled, and there must be judgment against the defendant upon the verdict.

Judgment on the verdict.

WHERE PROPERTY LEVIED ON BY CONSTABLE IS CLAIMED BY STRANGER, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted a bond of indemnity, he is bound to proceed and rely upon it: *Corson v. Hunt*, 53 Am. Dec. 568, and note 570. A sheriff, however, is bound to notice only legal claims, fairly exhibited, of third persons to property in the possession of an execution defendant, and not bare assertions and declarations: *Dunlap v. Berry*, 39 Id. 413. Service of process regular upon its face will protect an officer; but service of void process will not: *State v. McNally*, 56 Id. 650; *State v. Weed*, 53 Id. 188.

RIGHT TO RESIST OFFICER LEVYING ON PROPERTY NOT SUBJECT TO HIS WRIT.—One might suppose the cases on this subject to be quite numerous, but there is in reality very few of them. This, however, may be attributed to the respect which is paid to the process of courts of competent jurisdiction in this country. The decisions on this subject, appearing in the books, seem to resolve themselves into three classes: 1. Where an officer comes to attach the property of an individual on a writ against a third person, the owner may maintain his possession by force; 2. On the other hand, all right forcibly to resist the officer in such cases has by other courts been denied; it being deemed that, under these circumstances, the owner should yield his claim at once to trial by law; 3. Between these two extremes, other courts seem to hold a sort of middle ground; namely, that the facts which render a stranger guilty of impeding an officer will not necessarily make the owner so, but he may resist by all peaceable means short of personal violence.

1. *Resistance by Force*.—Property may be seized by an officer of court under a variety of writs, orders, or processes of the court. These may be divided into two classes: 1. Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all

the processes of the admiralty courts, by which the *res* is brought before it for its action. 2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. Of this class are the writ of attachment, or other meane process, by which property is seized before judgment to answer such judgment when rendered, and the final process of execution, or other writ, by which an ordinary judgment is carried into effect. The officer executing the first class of writs has no discretion to use, no judgment to exercise, no duty to perform, but to seize the property described. In the second class of writs referred to, the officer has a very large and important field for the exercise of his judgment and discretion: 1. In ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; 2. That it is the property which by law is subject to be taken under the writ; 3. As to the quantity of such property necessary to be seized in the case in hand. In all these particulars, he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to its prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. Courts cannot protect him against the parties so injured; because courts are not responsible for the manner in which he exercises that discretion which the law reposes in him and in no one else: *Buck v. Colbath*, per Miller, J., 3 Wall. 342-344. With respect to the first subject for the exercise of judgment and discretion named above, it is a general rule, laid down by the authorities, that the sheriff, or officer who executes a writ, is bound, at his peril, to take the debtor's goods alone, and that he is guilty of trespass for taking the goods of a stranger, even though assured by the plaintiff in execution that they are the property of the defendant: *Overby v. McGee*, 15 Ark. 461; S. C., 63 Am. Dec. 49; *Farr v. Newman*, 4 T. R. 633; *Glossop v. Pole*, 3 Man. & S. 174; *Curtis v. Patterson*, 8 Cow. 65. To this general rule there is, however, an exception, to the effect that where the goods of the defendant and a third person are so mixed that they may not be readily distinguished, the officer may levy upon them, and only becomes liable to a stranger for levying should he refuse to deliver them to the rightful owner upon request: *Bond v. Ward*, 7 Mass. 123; S. C., 5 Am. Dec. 28. The reason upon which this distinction rests is commendable for its tendency to encourage the officer in the discharge of his duty, when acting in good faith, by furnishing him protection, at least until he is advised that there exists an adverse claim to the property. Respecting the second ground for the exercise of judgment and discretion on the part of the officer, it has been held that if an officer attempt to take the property of one person, upon an execution or attachment against another, he may be forcibly resisted: *Wentworth v. People*, 4 Scam. 550; *Commonwealth v. Kennard*, 8 Pick. 132. In such cases, the officer is deemed a trespasser, and any stranger who aids him will be a trespasser, though he acts by the officer's command; and where he lays hands upon the owner to overcome his resistance, he is guilty of an assault and battery: *Elder v. Morrison*, 10 Wend. 139; S. C., 25 Am. Dec. 548.

In support of the position that when an officer transcends his jurisdiction, or illegally encroaches on a subject's rights, resistance to him is not only lawful but meritorious, it was argued by the old jurists, says Wharton, that it could not be justly replied that the subject, in case of oppression, could have redress by a suit at law. "What redress could he have if the injury suffered by him be irreparable? What comfort is it to a man who has been insulted,

plundered, or wounded, that the officer who has done him the injury is removed or imprisoned? And how poor a compensation is money to one who has had his family rights invaded, or his person maimed, or his business destroyed! And can even such reparations as these be secured? Is it sure that the law will punish the officer for his illegal acts? Is not the idea of the irresistibility of an official so far blended with that of infallibility that the same superstitious reverence for authority which saved him from being resisted when he outraged another may save him from being convicted when sued for the outrage? Is it certain that the offending officer will allow an appeal? Is it not likely that the violence that outrages will interpose to prevent the party injured from making complaint?" 1 Whart. Crim. L., sec. 647, giving the Roman law on this subject. In *Wentworth v. People*, 4 Scam. 550, a constable authorized to levy a writ of attachment against the property of one person attempted to take the property of another upon such writ, and was forcibly resisted. And such resistance was held to be lawful, upon the ground that as one person cannot be taken in custody under process against another, the law equally allows the protection of one's property and person from illegal aggression. The learned judge in that case argued that an officer in executing the process of the law is entitled to its protection so long as he keeps himself within the pale of its authority, but no longer; that the process is a sufficient warrant for the execution of its commands, but affords no authority to go beyond or contrary to its injunctions, and when the officer does so, he that instant ceases to be the minister of the law, and becomes its violator; and that the officer had no better right to take the property of the defendant by virtue of a writ commanding him to take the goods of another person than he would have had to do without a process against one. "If the officer acts in violation of the command of his writ by attempting to seize the person or property of one not liable to be taken by it, he becomes the wrong-doer, and may be resisted; but if it turns out that the person or property was subject to its operation, then those who resist its execution are guilty of an infraction of the law, and subject to its punishment. This reciprocal obligation to look to and abide by the consequences of their conduct is just and equal, and whatever hardship or inconvenience this may impose upon the officer is a consequence incident to the nature of his office; but there is little necessity for him either to incur responsibility or allow the mandates of the law to be put at defiance, for he is not required to levy a writ against the property of one man upon that of another; and when his opinion as to the ownership of property in possession of or claimed by another is well grounded, he may call to his aid the power of the county in executing his process; and after levy he can have a controverted title tried by a jury, whose verdict will be a guide and warrant for his future action; while on the other hand, to deny to the citizen the authority to assert his undoubted rights, but require him quietly to submit to their invasion, under color of process, at the mere caprice of every one clothed with a little brief authority, would be to convert the law, which he should be able to look to for protection against wrong, into a scourge and an instrument of oppression. It will not do to say that the individual should appeal to the law in every case, and submit to a trial of the right of property. This would unquestionably be prudent in doubtful cases, but in many it would be a very inadequate remedy, and in some a mere mockery of justice. Suppose an officer should, out of pure wantonness, seize the horse of a traveler upon the highway, under the authority of a writ against the property of another, or even without any writ, for his authority for the act would be the same in either case: can it be contended that the owner of the horse would have no right

to repel this aggression on his property? Surely not:" *Id.* 554, 555. In connection with this last illustration, it may be said that in England it is held that a party cannot distrain a horse while any person is riding him, because it would perpetually lead to a breach of the peace: *Storey v. Robinson*, 6 T. R. 138. In *Wentworth v. People*, 4 Scam. 550, it was also held that the statute giving the trial of right of property had not changed the law so as to do away with the right of resistance to an illegal seizure of property, nor superseded any former mode of trying the claimant's title to property; and that it was merely cumulative. So in *Commonwealth v. Kenaard*, 8 Pick. 132, the question arose whether the owner of goods in his own actual possession may not lawfully defend his possession of them against a seizure or an attachment by an officer who comes to take them on a precept against another person who has no right or interest in the goods; and it was there held that he could do so. This decision seems also to have proceeded upon the ground that a man may equally defend his person and property from invasions unsanctioned by lawful authority. The reasoning accorded well with that in *Wentworth v. People*, *supra*. The court could not distinguish between an officer who assumed to act under a void precept and a stranger who should do the same act without any precept; for a command, they said, to arrest the person or seize the goods of B is no authority against the person or goods of A. An officer, they said, without a precept is no officer in the particular case in which he so undertakes to act; and the officer must judge at his peril in regard to the person against whom he is commanded to act. This case is somewhat mollified, however, by recollecting that it was a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants, to whose care they were committed; and that they did nothing more than defend, with no more than necessary force, their possession. And the court expressly said that the decision would form no precedent for cases which might be differently circumstanced. In *United States v. McDonald*, 8 Bism. 439, the right of resistance was put upon the ground of the good faith of the officer; and it was there decided that if the officer holds a writ of attachment against A, and seizes the property of B thereon, acting in bad faith and without reasonable grounds for believing the ownership of the property to be in A, B may forcibly assert his right of possession without becoming guilty of the offense of resisting an officer.

2. *Resistance by Peaceable Means, without Resort to Personal Violence*, is the middle ground named above, and is applied by some courts where an officer attempts to levy an execution or attachment upon property not subject to his writ. Thus a constable in Arkansas attempted to levy upon a mare not in the possession of the defendant in execution, but in the possession of one Oliver, and at his house. Oliver resisted the levy by a "flourish of knives," and was indicted therefor. The court said that if the mare belonged to Oliver, the constable was invading his rights, and became a trespasser in attempting to levy upon; and without deciding whether Oliver was justified in making such resistance to a mere levy upon the mare, even if she belonged to him, when the law permitted more peaceable remedies, yet they did hold that the court below should have permitted Oliver to prove that the mare was his property, and not subject to the execution: *Oliver v. State*, 17 Ark. 508. So in *Smith v. People*, 99 Ill. 445, a writ of possession was awarded against the defendant, plaintiff in error, in an action of forcible detainer, and placed in the hands of an officer for execution. In attempting to execute the writ, the officer sought to deliver an article of property not embraced in the writ, and

to that end commenced to take down a fence so as to be able to seize and deliver the property to the plaintiff. The defendant, who was present, insisted that the officer was exceeding his powers, and replaced the fence as fast as the officer took it down, and continued to do so until the officer desisted. The officer took him by the arm and said he would have to arrest him, but the plaintiff in error used no violence against the officer, and made no menaces or threats, but simply prevented the officer from breaking the fence to seize property he had no right to seize. It was held that this did not constitute a resistance of the officer within the meaning of the statute, and that if an officer in attempting to execute process shall exceed the power conferred by the writ, he will be liable as a trespasser; but that this would not authorize the defendant to resort to personal violence against the officer while endeavoring to exceed his authority, unless to protect his own person from violence and injury.

3. *Owner must Yield his Claim by Law.* Notwithstanding the cogent reasons, above given, that a person may defend his property as well as his person from all unlawful interference at the hands of officers, yet the prevailing opinion now is in accordance with the views expressed in the principal case, which is supported by the following authorities: *State v. Downer*, 8 Vt. 424; S. C., 30 Am. Dec. 482; *State v. Miller*, 12 Vt. 437; *Merritt v. Miller*, 13 Id. 416; *State v. Buchanan*, 17 Id. 573; *State v. Fifield*, 18 N. H. 34; *Faris v. State*, 3 Ohio St. 159; *Cokely v. State*, 4 Iowa, 477; *United States v. McDonald*, 8 Biss. 439; *People v. Hall*, 31 Hun, 404. These cases seem to proceed upon the theory that an illegal arrest of one person upon process against another, and an unlawful taking of one man's property upon an attachment or execution issued against another, should not be governed by the same rules. They also make a pivotal point of the officer's good faith in the latter case. Thus in *State v. Downer*, *supra*, the doctrine of *Commonwealth v. Kennard*, 8 Pick. 132, was controverted and its opposite asserted by the supreme court of Vermont, in a well-reasoned opinion written by Redfield, J. "If," says the learned justice, "the owner of property may resist an officer in its defense, so may one who believes himself to be the owner; for it would not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible." He distinguishes the case from that of an illegal arrest of one person upon process against another, in which he admits that an officer attempting to make the arrest may be lawfully resisted, and says that "the case of property is very different. It depends upon criteria which are not the objects of sense." He also adverts to the consideration that it is the duty of the officer to attach property whenever requested to do so, as creating a distinction between his act and the gratuitous trespass of a stranger without pretense of process. It was held in this case that if an officer attach personal property in good faith, which in fact does not belong to the person on whose debt he made the attachment, still it is not lawful for the owner of the property even to resist the attachment, but he must resort to his action at law. So in *United States v. McDonald*, 8 Biss. 439, it was held that if an officer holds a writ of attachment against A, and seizes the property, acting in good faith and on reasonable grounds for believing the ownership of the property to be in A, resistance by B to service or execution of the process is unlawful. The doctrine of *State v. Downer*, *supra*, has been reaffirmed by other Vermont cases cited above. In *Faris v. State*, 3 Ohio St. 167, it was said that whatever may formerly and elsewhere have been the necessity for resistance to an officer, in certain cases, there is at this day, and in this country, no want of the peaceful protection of property against a seizure, made in

good faith by one clothed with public power, and subject to public responsibility. Nor is there any want of quiet, safe, and sure means to recover it when so taken. In this case, the Massachusetts, Vermont, and Illinois decisions above cited are reviewed and commented upon at some length.

In *People v. Hall*, 31 Hun, 404, an execution upon a justice's judgment against Charles Hall having been issued to a constable, that officer levied upon a quantity of beans in the barn of Ransom Hall, plaintiff in error, and the father of Charles, and which the constable had been informed and believed were the property of the debtor, who lived with his father on the premises. As the constable was about to remove the beans from the barn, the plaintiff in error told him that the beans were his, and that they did not belong to Charles, and he forbade the constable to levy on or remove them from the premises. The constable having attempted to remove them, the plaintiff in error put his hands upon the constable and excluded him from the barn, using only so much force as was necessary to prevent him from removing the beans. On this set of facts, the question arose as to whether one owning and in the actual possession of personal property is liable to an indictment for using force to prevent an officer from levying upon such property by virtue of an execution against another person, when the officer acts, not wantonly, carelessly, or oppressively, but in good faith, believing the property to be that of the execution debtor. It was held that he is liable, and the cases cited above, and which seem to exhaust the subject, were there cited. But Barker, J., dissented, and placed his dissent upon the common-law rule, as he understood it to be, that the owner of personal property, in the actual possession of the same, may defend his possession, using no more force than is necessary, as against an officer who seeks to seize and remove the same by virtue of legal process in his hands, commanding him, in general terms, to levy upon the property of another named in the writ. He cited several cases in support of his opinion.

In *Cokely v. State*, 4 Iowa, 477, on the trial of an indictment for an assault, after the state had proved that the party assaulted went to the house of defendant to assist a constable in levying an execution upon his property, the defendant offered to prove that the property levied on was exempt from execution, and that he requested them to levy on other; but this evidence was held to be properly excluded from the jury. The Vermont cases must not, however, be misunderstood. Some regard must be had to the rights which the owner has to his property, and they are not all to cease when the sheriff comes with a process, not against him, but against a third person with whom he has no connection; and it is not always true that the same facts which would render an entire stranger guilty of impeding and hindering an officer will render the owner guilty. A removal of property about to be attached, by an entire stranger, to prevent such attachment, might be an offense, when such a removal by the real owner, for the same purpose, to prevent its being attached as the property of another, would not be an offense. And the owner may make use of any peaceable means to prevent such attachment, as it would, in fact, be a trespass on him. He may keep or regain the possession peaceably, and when it can be done without using any force or violence against the officer: *State v. Miller*, 12 Vt. 437. And in such a case, where the owner subjects himself to an action at the suit of the officer, the defendant may show his right to the property, and thus defeat the action: *Merritt v. Miller*, 13 Id. 416. The Vermont cases, like the principal one, make the "force" used an element in the crime of resisting an officer; and it is "preventive force" alone, caused by other than

peaceable means, which is deemed unlawful. If one claiming to be the owner of property resists an officer who seeks to levy upon it as the property of another, he does so at his peril. The creditor may have an action on the case for unlawfully interrupting his attachment. The officer may have an action of trespass, if the goods are taken out of his possession. The trustee process will compel the possessor to make full disclosure of his right to hold.

And besides all this, the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty. Not only this; we have seen above that the owner who resists the officer in taking property not subject to his writ, though such resistance be accompanied by no more force than is necessary to prevent the levy, is not allowed to show that the property belongs to himself. The law thus takes away from him his only defense. The more prudent course, therefore, where the officer insists upon his levy, is for the owner to resort to his replevin, or to his action for damages; though in the former case he must give a bond with surety, and in the latter, the expense may consume the value of the property.

This seems to be the present law on the subject, although it appears to make a milk-sop of the owner in resisting an officer attempting to levy on property not subject to his writ.

BROMLEY v. ELLIOT.

[88 NEW HAMPSHIRE, 287.]

TWO MEN MUST BE CONSIDERED PARTNERS AS TO THIRD PERSONS, where they are jointly concerned in a transaction under an agreement to share between them indefinitely the profits of the business.

SECRET AGREEMENT OF PARTIES RELATIVE TO THEIR CONNECTION IN BUSINESS is binding between themselves, but will not control their responsibility to others ignorant of such agreement.

THIRD PERSONS ENTERING INTO SECRET AGREEMENT BETWEEN MEMBERS OF FIRM to share profits are liable as partners. Thus dormant partners who participate in the profits of trade and conceal their names are equally liable, when discovered, as if their names had appeared in the firm, although they were not known to be partners at the time of the creation of the debt.

THOSE DEALING WITH PARTIES CONNECTED IN BUSINESS ARE BOUND BY their agreements with each other, if at the time they know the nature of those agreements, or have knowledge of such facts or circumstances as would lead a man of common prudence to make inquiry in relation to them.

IF PERSONS ARE NOT PARTNERS AS BETWEEN THEMSELVES, they cannot be so charged by a third person having knowledge of the fact, or having such knowledge that he is bound to inquire concerning it.

THOSE WHO SHARE PROFITS OF BUSINESS ARE LIABLE AS PARTNERS to third persons under all agreements within the apparent scope of the business in which they are engaged, unless the limitations of their contracts are known to those with whom they deal, or are such as from the facts known to them they are bound to inquire. No other exception to the general rule can safely be admitted.

THIRD PERSON LIABLE AS PARTNER WHEN.—One having no knowledge of any partnership, and dealing with a party who shares the profits with a

third person, may charge such third person as a partner for all debts contracted within the apparent scope of the business of the party with whom they deal.

PERSONS TRANSACTING BUSINESS TOGETHER may be charged as partners for all debts contracted within the apparent scope of their business, whatever may be their contracts or stipulations with each other, by those dealing with them, and who have no knowledge of their agreements, or knowledge of any fact or circumstance which ought to put them on inquiry.

PERSON WHO RECEIVES SHARE OF BUSINESS PROFITS, by way of salary or compensation for services, is liable as a partner to third persons, unless the true character of the agreement is known, or the apparent relations of the parties is such as should put parties dealing with them upon inquiry.

BROAD RULE THAT "NO PARTNERSHIP WILL BE CREATED AS TO THIRD PERSONS, if the whole transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of a partnership," is not law, because it falls little short, if at all, of the doctrine that no persons will be liable to third persons as partners unless they are partners as between themselves.

IF PERSON TRANSACTS BUSINESS APPARENTLY ON HIS OWN ACCOUNT, and for his own benefit, another person, who is found to share the profits of the business with him, may be charged as a partner for all debts contracted by the former within the apparent scope of his business, without regard to any private agreements between them.

QUESTION WHETHER TWO PERSONS ARE PARTNERS AS TO THIRD PERSONS will be superseded by a determination of the fact that they are to be regarded as partners between themselves.

TWO LEADING PRINCIPLES OF CONTRACT OF PARTNERSHIP are, a common interest in the stock of the company, and a personal responsibility for the partnership engagements.

OWNERSHIP OF PROPERTY IN COMMON IS NOT NECESSARY TO CONSTITUTE PARTNERSHIP; yet each partner must bring into the common stock something that is valuable.

VALID PARTNERSHIP MAY BE CREATED BY ONE PERSON ADVANCING FUNDS, and another furnishing personal services and skill, in carrying on a trade, if the latter is to share in the profits.

PARTNERSHIP IS NOT CONFINED TO COMMERCIAL BUSINESS. It may exist between attorneys, conveyancers, mechanics, stage-line proprietors, artisans, or farmers, as well as between merchants. It may as well exist between brokers and factors or agents, whose sole employment relates to the property and business of third persons, as well as among those who jointly own the property in which they deal.

OWNERSHIP OF GOODS IN WHICH PARTNERSHIP DEALS may belong to one of the partners exclusively, just as well as to a stranger, without in any way affecting the validity of the partnership.

ESSENCE OF CONTRACT OF PARTNERSHIP is that parties should be jointly concerned in profits and loss, or in profits only, in some honest and lawful business; the relation of partnership being established by the fact that they share the profits between them.

PERSONS MAY BE PARTNERS AS TO PROFITS OF BUSINESS carried on by them jointly, though as to all the property employed in the business they may be several owners.

THAT PARTIES MUST SHARE PROFITS AS PROFITS, to render them liable as partners, is a distinction too thin to be satisfactory.
TERM "NET INCOME" CANNOT BE UNDERSTOOD TO MEAN GROSS PROFITS.
PAROL TESTIMONY WILL NOT BE RECEIVED TO CONSTRUCT WRITTEN CONTRACT of partnership, or to show the intention of the parties to it.

ASSUMPSIT against the defendants Elliot and Hovey, as late partners, jointly doing business under the firm name of S. Hovey, to recover for goods sold to Hovey for the use of the firm, and also to recover on a promissory note executed by Hovey on November 5, 1856, payable to plaintiffs, and given for goods sold and delivered by them to Hovey, for the use of the firm, etc. Hovey was defaulted, and Elliot pleaded the general issue. It was agreed that plaintiffs were partners in business; and that the goods specified in the account, as well as those for which the note was given, were sold, delivered, and taken into the store occupied by Hovey during his business relations with Elliot. On April 2, 1856, Elliot and Hovey had entered into an agreement to conduct the jewelry and fancy-goods business in Manchester. Elliot furnished the stock, and Hovey the store or salesrooms; and they were to share the profits. Each was to be the owner of the stock, employed in the business, which he had furnished. Hovey was to conduct the business in his own name alone, and was clothed with power to purchase any additional goods he chose. Other features of the agreement appear in the opinion. It appeared in evidence that Hovey conducted the business from April 2, 1856, to January 1, 1857, when he bought Elliot out. During the continuance of the business under the agreement, Hovey purchased about four thousand dollars' worth of goods, of which those sued for were part, and Elliot put into the store during the same time goods to nearly the same amount. At the time Hovey bought Elliot out, the profits of the business, including the profits of all the goods, both those purchased by Hovey and those put into the store by Elliot, amounted to about nine hundred dollars, which was equally divided between Hovey and Elliot, Hovey giving Elliot his note, secured by mortgage of the whole stock, for half that sum. Some losses were sustained, all of which were borne by Hovey, who was a jeweler by trade; and the proceeds of his labor when not engaged in selling goods, as well as those of a hired hand, were reckoned as profits. When Hovey bought Elliot out, he gave him a note for his part of the goods in the store, and his share of the profits of the business, and secured the same, and

other notes he owed him, by a mortgage of the entire stock then on hand. Elliot was permitted, against the objection of plaintiffs, to offer evidence tending to show, by the testimony of himself and Hovey, that there was no understanding between the defendants that they were partners; that Hovey had no control over the goods put into the store by Elliot, except to sell them; that Elliot had a right at any time to withdraw his part of the goods, and had no control over those purchased and put into the store by Hovey; that he did not exercise any authority in relation to the kind or quantity of goods purchased by Hovey, and that Hovey did not disclose to the plaintiffs or to anybody else the existence or terms of the agreement between himself and Elliot; that Elliot had no knowledge of the purchases made by Hovey of the plaintiffs; that nothing was said between the defendants as to how losses should be borne; and that Hovey was to be paid for his services by one half the profits arising from the sale of goods, after deducting expenses. A verdict was taken, by consent, for the plaintiffs, judgment to be rendered thereon, or the same to be set aside and judgment rendered for the defendant Elliot, and against Hovey, as the opinion of the court might be.

Morrison and Stanley, for William H. Elliot.

Clark and Smith, for the plaintiffs.

By Court, BELL, J. We regard the law as settled in this state, that where two men are jointly concerned in any transaction, under an agreement to share between them the profits of the business indefinitely, they must be considered as partners in the transaction. It was distinctly so decided in the case of *Brown v. Robbins*, 3 N. H. 65; and the court cite, in support of the decision, *Dob v. Halsey*, 16 Johns. 34 [8 Am. Dec. 293]; *Waugh v. Carver*, 2 H. Black. 235; *Grace v. Smith*, 2 W. Black. 998; *Coope v. Eyre*, 1 H. Black. 43; *Hoare v. Daves*, Doug. 373; *Walden v. Sherburne*, 15 Johns. 422. It was an action brought to charge two persons as partners, one of whom denied his liability; and the precise question was of the liability of the parties as partners to third persons.

The same principle is supported, as the general rule, by the elementary books, even where its force is impaired by groundless exceptions: 3 Stark. Ev. 1071, notes; 2 Saund. Pl. & Ev. 710; 1 Smith's Lead. Cas. 491; Gow on Partnership, 14; Smith's Merc. L. 21; Story on Partnership, 5, 60; Cary on

Partnership, 7; 3 Kent's Com. 32; and by a great mass of decisions: *Ex parte Digby & Jones*, 1 Deac. 341; *Barry v. Nesham*, 3 C. B. 641; *Reid v. Hollinshead*, 4 Barn. & Cress. 867; *Ex parte Langdale*, 18 Ves. 301; *Pott v. Eyton*, 3 C. B. 42; *Ex parte Rowlandson*, 1 Rose, 89; *Smith v. Watson*, 2 Barn. & Cress. 401; *Higbee v. Burge*, 9 C. B. 431; *King v. Dodd*, 9 East, 527; *Turner v. Bissell*, 14 Pick, 192; *Dickinson v. Roberts*, 12 Id. 74; *Denny v. Cabot*, 6 Met. 82; *Bailey v. Clark*, 6 Pick. 374; *Blanchard v. Coolidge*, 22 Id. 164; *Walden v. Sherburne*, 15 Johns. 409; *Oakley v. Aspinwall*, 2 Sandf. 7; *Hodgman v. Smith*, 13 Barb. 302; *Katskill Bank v. Gray*, 14 Id. 471; *Kellogg v. Griswold*, 12 Vt. 295; *Hastings v. Hopkinson*, 28 Id. 108; *Pierce v. Alexander*, 2 G. Greene, 427 [52 Am. Dec. 526]; *Motley v. Jones*, 3 Ired. Eq. 144.

Though the law allows parties to regulate their concerns as they please in regard to each other, they cannot, by any secret arrangement among themselves, control their responsibilities to others; and it is not competent for a person who partakes of the profits of a trade, however small his share of those profits may be, by any private or secret agreements between the parties, to withdraw himself from the obligations of a partner: *Waugh v. Carver*, 2 H. Black. 235; *Cheap v. Cramond*, 4 Barn. & Ald. 663; *Hoare v. Dawes*, Doug. 371; *Wightman v. Townroe*, 1 Mau. & Sel. 412; *Perry v. Randolph*, 6 Smed. & M. 335; *Bank v. Monteath*, 1 Denio, 402; *King v. Dodd*, 9 East, 527; *Ex parte Rowlandson*, 1 Rose, 89; *Ex parte Gellar*, Id. 191; *Ex parte Wheeler*, Buck, 25; 1 Smith's Lead. Cas. 363; 3 Kent's Com. 32.

The question as to the person on whom the responsibility of a partner ought to attach, in respect to third persons, arises in the case of dormant partners, who participate in the profits of a trade, and conceal the relations in which they stand to the business and to their fellows. Such parties are equally liable, when discovered and the facts shown, as if their names had appeared in the firm, and although they were not known to be partners at the time of the creation of the debt: 3 Kent's Com. 31; *Robinson v. Wilkinson*, 3 Price, 538; *Grace v. Smith*, 2 W. Black. 998; *Pitts v. Waugh*, 4 Mass. 424; *Lloyd v. Archboulde*, 2 Taunt. 324; *Boardman v. Keeler*, 2 Vt. 65 [15 Am. Dec. 670]; *Etheridge v. Binney*, 9 Pick. 272; *Lloyd v. Ashby*, 2 Car. & P. 138.

As the law is designed to protect third persons against the frauds which might be practiced, if secret agreements were

allowed to be binding on third persons, it holds all parties entering into such agreements to share profits liable as partners. But this liability depends, where the real agreement of the parties as between themselves is that they shall not be partners, upon the point of its secrecy. Because, as the parties are bound by their own stipulations as between themselves, so all who deal with them are equally bound by them, if at the time of their trading or contracting with the parties, or any of them, they know the nature of their agreements with each other: *Ensign v. Wands*, 1 Johns. Cas. 171; *Hastings v. Hopkinson*, 28 Vt. 108; *Guidon v. Robson*, 1 Campb. 302; *Alderson v. Pope*, 1 Id. 404, note; *Hind v. Rigg*, Man. Dig. 273; *Perkins v. Carruthers*, 3 Esp. 248; *Waland v. Elkins*, 1 Stark. 272; *Champion v. Bostwick*, 18 Wend. 186 [31 Am. Dec. 376].

Indeed, it is not necessary that they should actually know, or have been fully informed, of the real or supposed partnership agreements. They will be equally bound if they have been informed of such facts as should have led a reasonably prudent and cautious man to make inquiry: *Pinson v. Steinmyer*, 4 Rich. L. 309; *Town v. Hendee*, 27 Vt. 258; *Livingston v. Roosevelt*, 4 Johns. 251 [4 Am. Dec. 273]; *McIver v. Humble*, 16 East, 169; *Barfoot v. Goodall*, 3 Campb. 147; *Irby v. Vin- ing*, 2 McCord, 379; *Mowatt v. Howland*, 3 Day, 353.

This seems the only exception which can be admitted to the general rule, that he who shares profits must share losses and responsibilities, with safety to the public, or to those who deal with such parties. And under this exception will be found to range themselves a very large proportion of the cases where, upon one apparent ground and another, parties who were by their agreement to share profits have been held not chargeable as to third persons as partners.

By the facts laid before us in this case, the parties were to share in the profits of all the business done in the store kept by Hovey, as well the profits of the goods furnished by Elliot as of those purchased by Hovey. Under the general rule in *Brown v. Robbins*, 3 N. H. 65, they were chargeable as partners.

They do not come within the exception we have stated, as there is no evidence that the plaintiffs had any knowledge of the actual agreement; and as the business was all done by Hovey in his own name, there is no circumstance disclosed which was calculated to excite a suspicion, much less to put

them on inquiry, whether some one else was not interested in the profits of the business. Upon our view of the law, the defendants were therefore chargeable as partners.

It is contended in argument that the rule laid down in the case of *Brown v. Robbins*, *supra*, if true at all, is true only in the most general sense, and that there are exceptions and qualifications which include the present case.

Thus it is said they must share the profits as profits, to render them liable. The principle thus cited rests on a distinction long since disapproved as too thin to be satisfactory: *Ex parte Hamper*, 17 Ves. 404. If so absurd and groundless a doctrine were to be recognized as law, it would not reach this case, since it is expressly agreed that "the net income, after paying the expenses of the concern, is to be equally shared between the contracting parties." This is, in our view, nothing less than sharing the profits of the business as profits.

It is evidently the net profits which are to be thus divided, and not the gross profits, which it has been attempted, in some cases, to make a test to distinguish the cases where a partnership liability attaches and where it does not. The term "net income" cannot be understood to mean gross profits.

Again, it is said that a person may receive a share of the profits of a business, by way of salary or compensation for services, without being held liable as a partner to third persons. This principle has not been adopted here; and unless received with the qualification that the true character of the agreements between the parties is made known to those who may have dealings with them, or the apparent relations of the parties are so evidently those of principal and agent, or rather of master and servant, that no person could be misled or defrauded in consequence of the connection, it seems to us it would be of most unsafe and dangerous tendency, and wholly unfit to be adopted.

But if such a rule was established, it is not conceived that this case would fall within it. It was not a case where Hovey was to furnish merely his personal services, since it was expressly agreed that he was to furnish the store; and Hovey was also expressly authorized to procure and add to the stock furnished by Elliot such goods and to such value as he should think proper; the profits on the sales of which were to be accounted for and divided in the same manner as those on the goods furnished by Elliot.

Hovey, by the agreement, is not to stand, as to any of these goods, in the relation of a clerk or salesman to Elliot, or in any way as his servant. He is not to appear as mere broker or commission dealer, transacting the business of another; but he is to be presented as the principal merchant, proprietor of the goods, dealing on his own account and credit, and transacting the business for his own profit. Elliot furnished a capital and retained a control for his own security, but he stands apart, and is not seen by the world to have any interest or connection with the business. We cannot believe that in any court where the doctrine to which we have referred is adopted, it would be held to apply to a case of this kind, unless they are prepared to reject entirely all the received doctrines as to the liability of dormant partners, or to adopt the broad rule that "no partnership will be created as to third persons, if the whole transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of a partnership;" as laid down by a plausible writer, but often superficial thinker, which fall little short, if at all, of the doctrine that no persons will be liable to third persons as partners unless they are partners as between themselves.

To us it is a settled matter that dormant partners, who participate in the profits of the trade, and conceal their names, are equally liable, when discovered, as if their names had appeared in the firm, although they were unknown to be partners at the time of the creation of the debt; 3 Kent's Com. 311; *Robinson v. Wilkinson*, 3 Price, 538; *Grace v. Smith*, 1 H. Black. 48; *Pitts v. Waugh*, 4 Mass. 438; *Lloyd v. Archbowle*, 2 Taunt. 324; *Boardman v. Keeler*, 2 Vt. 65 [15 Am. Dec. 670]; *Etheridge v. Binney*, 9 Pick. 272; *Lloyd v. Ashby*, 2 Car. & P. 138.

The present seems to us precisely a case of this kind. By their agreement, Elliot was to furnish the capital; Hovey to furnish the store, and to transact the business in his own name, with power to purchase in his own name any additional goods he chose; and after deducting the expenses of the business, excepting Hovey's services, the net income and profits of the whole business (except some musical instruments) were to be equally divided between them—Hovey transacting the business in his own name and for his own benefit apparently, while Elliot kept out of sight, but shared the profits.

It is not to be believed that in any jurisdiction a party who, without knowing or having any reason to suspect that any third person had any interest in the business or any private

bargain with the apparent owner, had given him credit, and upon discovery of the fact that the person he dealt with was a mere clerk, without responsibility, had brought his action against the agent and the owner as partners, could be defeated on the ground that the agent sharing the profits received them only as wages or a compensation for services.

The doctrine that when the private agreements of parties are so drawn as to exclude some of the essential ingredients of a partnership, the parties shall not be charged as partners as to third persons, would overturn at once all the doctrines of the courts of common law for centuries; and though the courts, under the pressure of cases of individual hardship, from the general rule, have occasionally decided such cases upon slight and subtile and unsatisfactory grounds, there is no case, so far as we can find, which has in terms adopted or sanctioned or approved any such doctrine.

The decisions in a few recent cases have tended very strongly towards such a rule; but they all have been decided upon other and entirely distinct grounds. When a principle like this is generally received, it is apparent that fraud must have the widest scope, or the courts must be forced to protect the community by a new set of rules and distinctions, to supply the place of the wholesome principles maintained in all past times by courts of justice.

The case of *Newman v. Bean*, 21 N. H. 93, is cited in the argument to the position that where A was to furnish goods to B to sell as his agent, and B might fill up the store with articles that would sell at a profit, the profits, after paying expenses, to be divided, the parties would not be held partners as to third persons. It is erroneously cited to this point. The action was trover by A, who furnished the goods, against the sheriff, who attached the goods as the property of B. It was held that they were not partners as between themselves, and that B had no property in the goods.

The same remark applies to the similar case of *Judson v. Adams*, 8 Cush. 556. The decision relates to the question of partnership between the parties, and not as to third parties, and as to the property of goods manufactured by one person from the stock of another for a share of the profits.

The case of *Gibson v. Stevens*, 7 N. H. 352, has no tendency to show that parties sharing profits are not partners as to those who deal with them. It merely decides that if they are partners, they are not necessarily the owners of the property employed in their business.

The question whether these parties are to be deemed partners as to third persons must, of course, be entirely superseded, if it should prove, on examination, that they were in fact to be regarded as partners between themselves. Ordinarily, the two leading principles of the contract of partnership are a common interest in the stock of the company, and a personal responsibility for the partnership engagements; and both these seem to have been studiously avoided, it being obviously intended that each should continue to own the goods he placed in the store, and that the responsibility for all agreements made in the course of the business should rest on the party who made them.

But though each party must bring into the common stock something that is valuable, yet it is not necessary that there should be any property owned in common, to constitute a partnership.

If one person advances funds, and another furnishes his personal services and skill in carrying on a trade, and is to share in the profits, this constitutes a valid partnership; neither is it essential to a partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage-coaches, artisans, or farmers, as well as between merchants. It may as well exist between brokers and factors, or agents, whose sole employment relates to the property and business of third persons, as among those who jointly own the property in which they deal. There can be no valid reason why in such case the ownership of the goods in which a partnership deals should not belong to one of the partners exclusively, just as well as it might to a stranger, without in any way affecting the validity of the partnership. The essence of the contract is that they should be jointly concerned in profits and loss, or in profits only, in some honest and lawful business—the relation of partners being established by the fact that they share the profits between them. They are bound as partners to third persons by all agreements within the apparent scope of the business in which they are engaged, unless the limitations of their contracts are known to those with whom they deal, or are such as, from the facts known to them, they are bound to inquire. But as between themselves, their stipulations, so far as they are not forbidden by law, are binding; and we know of no rule by which persons are forbidden to be partners, as to the profits of a business carried on by them jointly, though as to all the

property employed in the business they may be several owners. Such seems to be the character of the trade of these parties. Each was to be owner of the stock employed in the business which he had furnished, while they were sharers of the profits alone.

In such case, the partners would not be liable for each other for any goods purchased by either to be used in the trade, when the seller was aware of the real nature of their partnership agreements.

But the case would be otherwise as to those who know nothing of their being in any way partners, and as to those who know the fact of a partnership, but know nothing of the precise stipulations between them. As to these, the private agreements form no test of the liability of the partners. The legal test is found in the apparent scope and character of the business. Here, the apparent scope of the business transacted by Hovey was the trade in watches, jewelry, etc., implying the buying and selling of that class of goods. That is the business evidently contemplated by their written agreement, and all bargains within the scope of that trade, when a partnership, however limited, is once proved, were as binding on Elliot as they were on Hovey himself.

The policy of the law is, we think, clearly shown in relation to this subject by the statute providing for limited partnerships, passed July, 1855—almost a year before the contract here in question was made—by which persons are permitted to invest their funds in trade as special partners, without personal liability, on compliance with certain conditions, the chief object of which is to secure entire publicity as to the fact and the principal terms of the connection. Upon the doctrine before referred to, in the extent which it is claimed to have, such a law must be idle; allowing that to be done under onerous and troublesome conditions which the law already allowed to be done without them.

It seems to us impossible to regard this in any other light than as a secret and dormant partnership, and the parties must both be held liable as partners for the debts in suit.

An objection was made to evidence given by Elliot and Hovey. So far as their testimony tended to give a construction to the written contract, and to show the intention of the parties in it, it is clearly inadmissible, as tending to explain or vary a written contract. In the view we have taken of the case, this does not seem to be of much importance.

Judgment on the verdict.

SHARING IN PROFITS IS TEST OF PARTNERSHIP, but each party must share in such profits as a principal: *Osborne v. Brennan*, 10 Am. Dec. 614; *Brown's Ex'r v. Higginbotham*, 27 Id. 618; *Wilkinson v. Jett*, 30 Id. 493; *Loomis v. Marshall*, Id. 596, and note 606; *Champion v. Bostwick*, 31 Id. 376, and note 382; *Howell v. Harvey*, 39 Id. 376; *Bartlett & Co. v. Jones*, 49 Id. 606; *Price & Co. v. Alexander & Co.*, 52 Id. 526; *Griffith & Co. v. Buffum*, 54 Id. 64; *Ellsworth v. Tartt*, 62 Id. 749, and note 752. These cases show that an agreement to participate in the losses is an element of partnership. They also show other elements constituting that relation. See particularly note to *Loomis v. Marshall*, 30 Id. 606; *Heran v. Hall*, 35 Id. 178.

WHEN ONE RECEIVING COMPENSATION OR REWARD FOR HIS SERVICES WILL BE REGARDED AS PARTNER: *Simpson v. Feltz*, 16 Am. Dec. 602; *Loomis v. Marshall*, 30 Id. 596, and note 606; *Champion v. Bostwick*, 31 Id. 376; *St. Victor v. Doubert*, 29 Id. 447; *Chandler v. Howland*, 66 Id. 487; *Ellsworth v. Tartt*, 62 Id. 749. These cases bear out the proposition that if a person is to receive for his services emoluments depending upon the profits and losses of the trade, he is to be considered a partner; but if he is to receive a certain and definite portion of the profits, he is not a partner. This is a harmonizing distinction which probably runs through nearly all the cases. In *Price & Co. v. Alexander & Co.*, 52 Id. 526, it is held, however, that one contracting for a share of the profits generally in business is a partner as to third persons, but is not necessarily such as between him and the party with whom he so contracts.

WHERE ONE FURNISHES HIS CAPITAL OR GOODS for an undertaking, and another puts in his services in consideration of a share of the profits indefinitely, there is a partnership between them as regards the parties themselves, as well as third persons: *Dob v. Halsey*, 8 Am. Dec. 293; *Miller v. Hughes*, 10 Id. 719. But a partnership is not created by the fact that one party agrees to furnish the goods and pay all expenses, and another party agrees to transact the business for one half of the profits as compensation: *Bradley v. White*, 43 Id. 435. And in *Heran v. Hall*, 35 Id. 178, it is held that where, in a joint adventure, one furnishes money and another labor, they are not partners *inter esse*, in the technical sense, merely because they have a mutual interest in the profits. And he who contributes the labor is not liable to him who advances the money for any part of the capital lost in the venture.

PERSONS MAY BE PARTNERS AS TO THIRD PERSONS, and not be so as between themselves: *Allen v. Dunn*, 33 Am. Dec. 614. Persons not partners as between themselves become liable as partners to third persons by holding themselves out to the world, or those with whom they deal, as partners: *Spears v. Toland*, 10 Id. 722; *Crosier v. Kirker*, 51 Id. 724; *Burr v. Byers*, 52 Id. 239; *Ellsworth v. Tartt*, 62 Id. 749, and note 752. Participation in profits of business constitutes a partnership as to third persons, and the members will be held liable as such, though the business be carried on in the name of one alone, and neither supposes that they are partners, nor intends to become such, nor are such as between themselves: *Sheridan v. Medara*, 64 Id. 464. Concerning evidence of partnership as to third persons, see *Hunt v. Jucks*, 1 Id. 555, and *Bryden v. Taylor*, 3 Id. 554, in addition to what is said on this point in some of the cases cited above.

JOINT OWNERSHIP OF PROPERTY IS NOT NECESSARY to constitute partnership: *Champion v. Bostwick*, 31 Am. Dec. 376; *contra: Price & Co. v. Alexander & Co.*, 52 Id. 526. There must, however, be a joint adventure: *Loomis v. Marshall*, 30 Id. 596.

DORMANT PARTNERS, WHO ARE—THEIR LIABILITIES, ETC.: See *Brooke v. Washington*, 56 Am. Dec. 142, and extended note thereto 147-151.

"PROFITS AS PROFITS:" See what is said on this phrase in the notes to *Loomis v. Marshall*, 30 Am. Dec. 596, and *Champion v. Bostwick*, 31 Id. 382.

ONE WHO SHARES PROFITS OF PARTNERSHIP MUST ALSO SHARE ITS LOSSES: *Miller v. Hughes*, 10 Am. Dec. 719.

PAROL EVIDENCE IS NOT ADMISSIBLE TO CONTRADICT OR VARY the terms of a written contract: *Adair v. Adair*, 71 Am. Dec. 779, and note thereto 785, referring to prior cases in this series.

CITATIONS OF PRINCIPAL CASE.—*Elliot v. Stevens*, 38 N. H. 311, was a case of trover for twelve gold watches. Plaintiff claimed them under the mortgage from Hovey for an individual debt alone. They had been attached by defendant for a debt which was claimed to be a partnership debt of plaintiff and Hovey, as partners under the firm name of S. Hovey. On page 312 Id., the facts of the principal case were adverted to, showing that by the arrangement made between the partners themselves, each owned certain distinct parts of the stock on which the partnership business was transacted. "Taking the watches," said the court, "to have been part of the stock which was owned by Hovey, the question arises whether the stock thus owned separately, as between the parties themselves, is to be regarded as partnership property for the satisfaction of partnership debts. In this case, Elliot was a secret partner. Of course, the creditors of the firm had no knowledge that any part of the property on which the business of the partnership was done belonged to him individually, and was not partnership property. We think, in such a case, where the business is done on a stock in trade as the partnership stock, and the creditor of the firm has no knowledge that there is an arrangement by which, as between the partners, each owns a separate part of the stock, that the creditor is not bound by such an arrangement, and that he has a right to look to the property and stock which is used in the partnership business as a fund pledged to the payment of the partnership debts." The subject of a sharing-profits test in partnerships was elaborately discussed in the valuable case of *Eastman v. Clark*, 53 N. H. 276-342, and extended note thereto, and it was there shown that the sharing of profits by a partner in any other sense than as a principal is not an absolute test of his liability. The principal case was cited on pages 282, 286, 288, et seq., to the point that a secret or private arrangement between partners is not binding on third persons where they have no knowledge of it; but that, so far as the agreement is known, it must be binding on all who do have knowledge of it. *Elliot v. Stevens*, 38 Id. 311, was also cited on pages 287 et seq., to the point that if a partner's failure to disclose a private agreement has caused a person dealing with the firm to entertain a reasonable belief in the existence of a certain state of facts, and to act on that belief, he will not be permitted afterwards to controvert the existence of such facts to the prejudice of the creditor.

DAME v. DAME.

[88 NEW HAMPSHIRE, 423.]

RULES OF COMMON LAW CONCERNING RIGHTS OF LESSOR AND LESSEE IN BUILDINGS, ETC., erected upon leased property, may be modified by agreement of parties upon the subject; and so far as such agreement extends, the question is no longer, What is the common law? but, What have the parties agreed?

WHERE BUILDING IS ERECTED BY ONE MAN UPON LAND OF ANOTHER, by his permission and upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of the person who erected it. In such a case, it is immaterial what is the purpose, size, material, or mode of construction of such building.

TROVER WILL LIE FOR VALUE OF BUILDING ERECTED BY ONE MAN UPON LAND OF ANOTHER, where the former erected it with authority to remove the same at pleasure; and where the owner of the land afterwards resists such removal, or otherwise converts the building to his own use. Either the builder or his assignee may bring the action.

IT IS NO EVIDENCE OF CONVERSION THAT OWNER OF LAND refuses to deliver up or remove from his premises, upon a demand for that purpose, a building erected there upon an understanding that the builder may remove it at pleasure, because the owner of the land owes no duty to the builder further than not to oppose the removal.

TRESPASS IS NOT COMMITTED BY ONE WHO HAS ERECTED BUILDING UPON ANOTHER'S LAND with permission to remove it when he sees fit, if he, doing no unnecessary damage to the owner, enters upon the land for the purpose of removing it within a reasonable time after the owner of the land withdraws his consent that the building shall remain, or puts an end to the estate at will of the owner of the building in it; because the proprietor of goods and chattels has authority by law to enter the land of another upon which they are placed, and remove them, provided they are there without his default.

TRESPASS IS COMMITTED BY ERECTOR OF BUILDING UPON ANOTHER'S LAND BY ENTRY TO REMOVE SUCH BUILDING, if the owner of the building allows it to remain on the owner's land an unreasonable time after his right of removal has ended, or if such right terminates by his own act before removal. It is his fault that it remains afterwards; and he will be liable for all damage done by him to the owner of the land, but not for the value of the property removed.

LIQUENNE TO CONTINUE BUILDING UPON OWNER'S LAND IS REVOKED by conveyance of owner's interest in the land, where the builder has put his structure there with a right of removal; but the owner of the building will not be affected by it till notice, either actual or constructive, of the revocation.

NO INTEREST IN BUILDING ERECTED UPON ANOTHER'S LAND WITH RIGHT OF REMOVAL PASSES BY CONVEYANCE of the owner's interest in the land, whether the purchaser had notice of the position of the building or not. If he is wronged, his remedy is upon the covenants in his deed.

RESERVED RIGHT TO REMOVE BUILDING ERECTED ON ANOTHER'S LAND IS PERSONAL, and is not affected by a recovery of the land by an assignee of the owner with notice, whether the buildings were upon the land by right or by wrong. Such a right of removal would give no interest in

the land within the statute of frauds, would give no seisin or possession of the land, and would constitute no defense in a real action for the land. TENANCY AT WILL IS TERMINATED BY SALE OF PROPERTY.

COURT WILL RARELY INTERFERE TO ORDER NEW TRIAL ON MOTION OF PARTY WHO HAS HAD DUE NOTICE OF SUIT, employed counsel, and who has been defaulted with the knowledge and consent of his counsel, but through some fault or mistake of theirs. A clear case of accident, mistake, or misfortune must be shown to induce the court to do so.

PETITION for new trial, setting forth that in 1842 Timothy Dame was possessed of a tract of land in Farmington, containing twelve acres, etc., with stated boundaries; that the petitioner, Edward Dame, in that year, by permission of said Timothy Dame, erected on said tract a dwelling-house and barn, of the value of five hundred dollars; that on January 13, 1853, Timothy Dame conveyed said land by warranty deed to Daniel W. Dame and Isaac Worster, the petitionees, reserving the house and barn, erected as above stated, with the power to remove them. The petition further alleged that on January 2, 1854, Dame and Worster procured a writ of attachment to be served on the petitioner, and demanded of him a certain messuage, it being the same land named above. By accident, mistake, or misfortune, the attorneys of petitioner filed a plea or answer, claiming for him title to an undivided moiety of said land, and disclaiming the residue. The suit was continued until the March term, 1855, when through accident, mistake, or misfortune a default was entered, and judgment rendered for the plaintiffs, a writ of possession issued, and the petitioner was turned out of possession of said buildings, and deprived of the right of possession and right to remove them. It further appeared that on October 26, 1855, said Timothy, for a nominal consideration, released to said D. W. Dame and Worster his right, title, and interest in the house and barn. The evidence substantially supported the allegations of the petition, which prayed a new trial or other relief.

Hamlin, for the petitioner.

Christie, for the petitionees.

By Court, BELL, J. The rules of the common law, relating to the rights of lessor and lessee, in buildings and other structures erected by the lessee upon the property leased, and in such things as are annexed and affixed to any buildings or structures thereon, are liable to be changed and modified in any way by the agreements made by the parties on the subject; and so far as such agreements extend, the question is no

longer, What is the common law? but, What have the parties agreed? *Amos & Ferard on Fixtures*, 97, 103, 104; *Broom's Legal Maxims*, 280; *Dubois v. Kelly*, 10 Barb. 496; 2 *Smith's Lead. Cas.* 87; *Wall v. Hinds*, 4 Gray, 273 [64 Am. Dec. 64]; *Smith's Land. & Ten.* 352; *Foley v. Addenbrooke*, 13 Mee. & W. 174.

It is in accordance with this principle that it has been settled by many decisions, that where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of the person who erected it. In such case, it is immaterial what is the purpose, size, material, or mode of construction of such building: *Vanness v. Packard*, 2 Pet. 137; *Taylor's Land. & Ten.*, sec. 546. It is merely personal, and is governed by the same rules as any other article of personal property; as, for instance, a pile of lumber, left by consent of the owner of the land upon his premises: *Smith v. Benson*, 1 Hill (N. Y.), 176.

This principle has been recognized and applied in *Wells v. Banister*, 4 Mass. 514; *Doty v. Gorham*, 5 Pick. 489 [16 Am. Dec. 417]; *Marcy v. Darling*, 8 Id. 283; *Ashmun v. Williams*, Id. 404; *Rogers v. Woodbury*, 15 Id. 156; *Wall v. Hinds*, 4 Gray, 273 [64 Am. Dec. 64]; and see *Washburn v. Sprout*, 16 Mass. 449; in *Osgood v. Howard*, 6 Me. 425 [20 Am. Dec. 322]; *Russell v. Richards*, 10 Id. 429 [25 Am. Dec. 254]; *Hilborne v. Brown*, 12 Id. 162; *Tapley v. Smith*, 18 Id. 12; *Doak v. Wiswell*, 38 Id. 572; *Fuller v. Tabor*, 39 Id. 519; *Pullen v. Bell*, 40 Id. 314; in *Barnes v. Barnes*, 6 Vt. 388, with which *Leland v. Gassett*, 17 Id. 403, is not inconsistent; in *Curtiss v. Hoyt*, 19 Conn. 154 [48 Am. Dec. 149]; in *Smith v. Benson*, 1 Hill (N. Y.), 176; *Smith v. Jenks*, 1 Denio, 580; *Godard v. Gould*, 14 Barb. 662; *Mott v. Palmer*, 1 N. Y. 564; *Ombony v. Jones*, 21 Barb. 520; in *Brearly v. Coz*, 24 N. J. L. 287; in *McCracken v. Hall*, 7 Ind. 30; in *Stillman v. Hamer*, 7 How. (Miss.) 421; and in *Haven v. Emery*, 33 N. H. 66.

If in such case the owner of the land resists the removal of such building, or otherwise converts it to his own use, he will be liable in trover for the value of it, either to the builder or his assignee: *Osgood v. Howard*, 6 Me. 452 [20 Am. Dec. 322]; *Russell v. Richards*, 10 Id. 429 [25 Am. Dec. 254]; *Wansbrough v. Maton*, 4 Ad. & El. 884; *Hilborne v. Brown*, 12 Me. 162;

Smith v. Benson, 1 Hill (N. Y.), 176; *Fairburn v. Eastwood*, 6 Me. & W. 679; *Tapley v. Smith*, 18 Me. 12.

But a mere refusal or neglect to deliver it, or to remove it from his premises, upon a demand for that purpose, will not be evidence of a conversion, because the owner of the land owes no duty to the builder but not to oppose the removal.

If the owner of the land withdraws his consent that the building should remain, or puts an end to the estate at will of the owner of the building in it, the latter may enter upon the land, and peaceably remove the building, doing no unnecessary damage to the owner, within a reasonable time, without being a trespasser: 1 *Taylor's Land. & Ten.* 369; *Weeton v. Woodcock*, 7 Me. & W. 14; *Wood v. County of Cheshire*, 32 N. H. 424; *Doty v. Gorham*, 5 Pick. 489 [16 Am. Dec. 417]; *Rising v. Stannard*, 17 Mass. 287; *Ellis v. Paige*, 1 Pick. 49; because the proprietor of goods and chattels has authority by law to enter the land of another upon which they are placed, and remove them, provided they are there without his default: *Ham. N. P.* 169; *Bac. Abr.*, tit. Trespass, F, 1; 2 *Rolle Abr.* 55; 2 *Id.* 566 (i., p. 9); *Cro. Eliz.* 329; 1 *Swift's Sys.* 525.

But if in such case the owner of the building suffers it to remain an unreasonable time, or if his right to continue it terminates by his own act before its removal, it is his fault that it remains afterwards; and if he enters to remove it, he will be liable in trespass for all damage done by him to the owner of the land, but not for the value of the property removed: *Web v. Pater Noster*, Palm. 71; *Mumford v. Whitney*, 15 Wend. 380 [30 Am. Dec. 60]; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 64.

If the owner of the land conveys his interest, it will operate as a revocation of the license to continue the building upon it; but the owner of the building will not be affected by it till notice, either actual or constructive, of the revocation: *Dubois v. Kelly*, 10 Barb. 496; *Rising v. Stannard*, 17 Mass. 286.

It has even been held that no interest in the building passes by the conveyance, whether the purchaser had notice of the position of the building or not: *Russell v. Richards*, 10 Me. 429 [25 Am. Dec. 254]; *Dubois v. Kelly*, 10 Barb. 496; *Smith v. Benson*, 1 Hill (N. Y.), 176; and if he is wronged, his remedy is upon the covenants in his deed: *Mott v. Palmer*, 1 N. Y. 564; but on this point we express no opinion.

In the present case, it may be fairly inferred, nothing being stated to the contrary, that the house and barn here in question were constructed in the usual manner, and were therefore

prima facie a part of the real estate; but they were erected by the petitioner upon the land of his father, by his express assent and permission, and upon an understanding almost necessarily implied in such permission, and here proved by the reservation of the father's deed of the right to remove these buildings. They did not, therefore, become part of the real estate, but remained merely personal chattels. By the father's deed to the defendants, the real estate alone passed, but these chattels did not because it purported to convey the real estate alone; because the father had no title in them that he could rightfully convey, and because they were reserved in the first deed, and the second granted nothing but a release of his claim upon them, under the reservation of the first. The conveyance to the defendants upon notice put an end to the license to continue these buildings on the land sold, or to remove them; but the law gave to the petitioner a right to retain them, and to remove them during a reasonable time after notice of that sale. After the lapse of such time, they still remain the property of the petitioner, but as they continue upon the land by his own fault, he cannot enter upon the land to remove them without a trespass; but if he does enter, he will be liable only for the damage which he does, and which the buildings have caused, and not for the value of them.

On the other hand, if the defendants resist their removal, or convert the buildings to their own use, they will be answerable to the petitioner in trover for their value; but as they are not bound to remove them or deliver them, or even to assent to their removal, they will not be made liable by a mere demand and refusal.

The action brought by the defendants was for the recovery of the land alone. The judgment rendered in it could not affect the petitioner's title to his chattels then upon the land, whether they were there by right or by wrong; nor could it in any way affect the merely personal right of the petitioner to remove them, or to recover their value, if they were withheld from him. The right to enter for the purpose of removing this property gives no seisin or possession of the land, and is not even an interest in land within the statute of frauds: *Wood v. County of Cheshire*, 32 N. H. 424. Such a right constitutes no defense in a real action, and we have found no plea in which any similar right, or even a right to an easement, has been attempted to be set up as a defense to a real action. As the right of the petitioner to these buildings cannot avail in defense of the action, he cannot be benefited by a new trial.

The license to erect these buildings, and to occupy them, on the father's land, constituted a lease at will. If it could be deemed a lease from year to year, it would continue till terminated by a notice to quit, notwithstanding the deed to the defendants: *Doty v. Gorham*, 5 Pick. 489 [16 Am. Dec. 417]; *Birch v. Wright*, 1 T. R. 378; *Madden v. White*, 2 Id. 159; but as there was no rent reserved, or time of payment limited, it must be deemed a tenancy at will strictly: *Taylor's Land. & Ten.* 36; 1 *Swift's Sys.* 95; *Right v. Beard*, 13 East, 210; and was terminated by the sale of the property: *Taylor's Land. & Ten.* 37; *Ball v. Cullimore*, 2 *Crompt. M. & R.* 120; 1 *Swift's Sys.* 90.

It is not necessary to discuss the question whether a new trial will be granted, where the party had due notice of the suit, and employed counsel, and was defaulted with the knowledge and assent of his counsel, but through some fault or mistake of the counsel. It would seem that a very clear case of accident, mistake, or misfortune must be shown to induce the court to interfere.

Petition dismissed.

SPECIAL AGREEMENT BETWEEN LANDLORD AND TENANT REGARDING FIXTURES overrules and supersedes the general rules of law regulating the mutual rights and obligations: *Wall v. Hinds*, 64 Am. Dec. 64.

BUILDING IS FIXTURE, WHEN: See *Taylor v. Townsend*, 5 Am. Dec. 107; *Butler v. Page*, 39 Id. 757; *Gilliam v. Bird*, 49 Id. 379.

BUILDING IS PERSONAL ESTATE, WHEN: See *Curtiss v. Hoyt*, 48 Am. Dec. 149, and note 158. A house which the owner of land agrees shall belong to another is subject to execution against the latter: *Foster v. Mabe*, 37 Id. 749.

BUILDING ERECTED ON ANOTHER'S LAND, TO WHOM BELONGS: See *Russell v. Richards*, 26 Am. Dec. 532, note 539, where a large number of cases on this subject is collected.

OWNER OF LAND IS ENTITLED TO FIXTURES, WHEN AND WHEN NOT: See *Rives v. Dudley*, 67 Am. Dec. 231; and reference to collected cases in note thereto 241

ATLANTIC MUTUAL FIRE INS. CO. v. YOUNG.

[88 NEW HAMPSHIRE, 451.]

PROMISSORY NOTE NOT PAYABLE IN ALTERNATIVE.—A promise contained in the deposit note given by the insured to a mutual fire insurance company, upon the issuing of a policy to him, "to pay to the company, or to their treasurer," the assessments which may be ordered by the directors, is not a promise in the alternative to one of two distinct parties. It is a contract with and promise to the company, and equally so whether described as a promise to pay to their treasurer, or to the company without refer-

once to the treasurer; and a right of action exists in the company alone upon the non-performance of such contract.

BREACH OF CONTRACT MAY BE ASSIGNED AFFIRMATIVELY OR NEGATIVELY BY USING WORDS OF CONTRACT, provided the affirmation or negation in that form necessarily amounts to a breach; or it may be in words containing the sense and substance of the contract, but they must be co-extensive with it in their import and effect.

IF BREACH ASSIGNED IS MORE ENLARGED OR MORE LIMITED THAN CONTRACT ALLEGED, it is bad on demurrer. Thus when the promise contained in the deposit note given by the insured to a mutual fire insurance company is set out in the declaration as a promise to pay such assessments, and at such times, as may be ordered by the directors, agreeably to the act of incorporation and by-laws of the company; while the breach assigned is enlarged to the non-payment of an assessment ordered by the directors, without averring whether it was made in conformity to the act and by-laws or not; and further enlarged as to time, so that it may include an assessment ordered to be paid on some day subsequent to the commencement of the suit as well as prior, and without alleging the time when it was ordered to be paid—the declaration is bad on demurrer.

ASSUMPSIT. The first and fourth counts of the declaration alleged that defendant gave plaintiff his deposit notes for value received in policy No. 3421, and promised to pay said company, or their treasurer for the time being, the sum, etc., in such portions and at such times as the directors of said company might, agreeably to their act of incorporation and by-laws, require. In alleging a breach of this contract, in each of the counts named, plaintiffs failed to state that the assessment, for the non-payment of which they sought to recover, was made agreeably to the act of incorporation and by-laws of the company. In the first count, plaintiff also failed to allege the time limited for payment of the assessment. A general demurrer was filed to each of these two counts, upon the grounds stated in the opinion, and was sustained by the court. Plaintiffs excepted.

Jordan and Rollins, for the plaintiffs.

Woodman and Doe, for the defendant.

By Court, SAWYER, J. Two grounds of demurrer are taken, which are common to both counts, namely: 1. That they set out the note declared on as payable in the alternative, to the company or to their treasurer; and 2. That they do not allege that the assessment for non-payment of which the plaintiffs seek to recover was made agreeably to the act of incorporation and by-laws of the company. A third ground is taken, which applies only to the first count, that the time limited for payment of the assessment is not alleged.

The first ground cannot be maintained.

The contract as set forth is not, as in *Willoughby v. Willoughby*, 5 N. H. 244, a promise to two distinct parties in the alternative, in which case the contract is held to be made with both as joint promisees. It is a contract with and promise to the company, and equally so whether described as a promise to pay to their treasurer, or to the company without reference to the treasurer: *Pigott v. Thompson*, 3 Bos. & Pul. 147. The same party is designated as promisee in either case, to wit, the company. The contract is with them, upon a consideration proceeding from them, and can in no view be regarded as a contract with and promise to the company, and also the person who may be treasurer when the payment is to be made, as joint promisees. The promise is to the company to pay them, and the insertion of the words "or their treasurer" merely introduces a stipulation that the payment agreed to be made to them shall be considered as made to them, so as to fulfill the contract, if made to the person who may then be their treasurer.

The other ground of demurrer to both counts is well taken. The contract is alleged to be to pay in such portions and at such times as the directors may require, agreeably to the act and by-laws. The breach assigned is the non-payment of an assessment required by the directors, without alleging that it was made in conformity to the act and by-laws. This is matter of substance, and open to general demurrer. In assigning the breach of a contract affirmatively or negatively, it may be done by using the words of the contract, provided the affirmation or negation in that form necessarily amounts to a breach, or it may be in words containing the sense and substance of the contract, but they must be co-extensive with it in their import and effect: 1 Ch. Pl. 326-328; Com. Dig., tit. Pleader, C, 45, 47; 2 Saund. Pl. & Ev. 181; *Greenby v. Wilcocks*, 2 Johns. 1 [3 Am. Dec. 379].

If the breach assigned is more enlarged or more limited than the contract alleged, it is bad on demurrer, as in covenant to repair a fence, except on the west side, and a breach that the defendant did not repair generally without restricting it to other parts than the west side; and in covenant for quiet enjoyment without lawful disturbance, and a breach that the plaintiff was disturbed without alleging how or by whom, constituting a lawful disturbance. Here the contract is to pay such assessments as may be ordered by the directors, agreeably to the act and by-laws, while the breach is enlarged to the non-payment

of an assessment ordered by the directors, whether made in conformity to the act and by-laws, or not.

The demurrer would also seem to be well taken as to the first count, upon the ground that the time fixed for the payment of the assessment is not alleged. The contract is to pay at such times as the directors may require. The breach as set out may include an assessment ordered to be paid on some day subsequent to the commencement of the suit as well as prior.

The exception taken to the ruling of the court below sustaining the demurrer must be overruled. The plaintiff will probably obtain leave to amend in that court upon such terms as will be equitable.

INSTRUMENT PAYABLE IN ALTERNATIVE TO ONE OF TWO PERSONS: See *Muselman v. Oakes*, 68 Am. Dec. 583, and note 584, referring to other cases.

BREACH OF OFFICIAL BOND MAY BE ASSIGNED NEGATIVELY: *Governor v. White*, 24 Am. Dec. 763.

ONE CANNOT AVER CONTRARY TO BOND OR RECORD DECLARED ON: *Detroit v. Miller*, 29 Am. Dec. 126.

COMBS v. WINCHESTER.

[39 NEW HAMPSHIRE, 12.]

TESTIMONY OF WITNESS THAT "HE HAD NOT SAID" that he knew a certain fact is immaterial, irrelevant, and inadmissible, although elicited for the purpose of contradicting him in case he denied it.

RULE FOR DETERMINING WHEN EVIDENCE IN CONTRADICTION OF WITNESS IS ADMISSIBLE.—If it is proposed to contradict the answer to a question asked a witness, the question must be such as would be admissible, if proposed, by the party calling him.

ANSWER TO QUESTION ADMISSIBLE ONLY ON CROSS-EXAMINATION, and which is merely collateral, cannot be contradicted.

WITNESS CANNOT BE INTERROGATED ON SUBJECT NOT PERTINENT to the issue, for the purpose of contradicting him.

CASE. Plaintiff was injured in consequence of a defect in the highway. Defendant, the town of Winchester, pleaded contributory negligence on plaintiff's part, which negligence consisted in driving with a nut off of a bolt of the carriage; and alleged that plaintiff was aware of the fact. One of plaintiff's witnesses, who was not interrogated on direct examination regarding the nut or bolt, was asked if he had not said that he knew the bolt had no nut on it, and that plaintiff would get his neck broken. He answered in the negative.

Defendant then offered to prove that witness had so stated, but the evidence was not admitted, and defendant excepted.

E. L. Cushing, for the defendant.

Wheeler and Faulkner, for the plaintiff.

By Court, BELL, J. Of the two cases cited for the defendant, the last, *Martin v. Farnham*, 25 N. H. 195, has no material bearing upon the question raised in this case. It was there held that evidence showing that a witness had made statements substantially different from those he now makes, and inconsistent with them in regard to material matters, is inadmissible to affect his credit; and that statements made by a witness relative to his state of feeling towards a party are regarded as material, and may be contradicted.

In the present case, the question had no relation to any supposed bias or prejudice of the witness, or any friendship or hostility to either of the parties. The question here is, whether the testimony of the witness, that he had not said that he knew the bolt had no nut on it, was material and relevant to the issue, or was a matter merely collateral. The fact that there was no nut upon the bolt was relevant and material. If the witness had stated, as a fact he knew, that there was no nut upon the bolt, it would have been competent to impeach him by showing that he had said elsewhere that there was a nut on the bolt, or that he did not know whether there was or not. Such a statement might be proved by cross-examination of the witness, or by the testimony of others.

It may always, we think, be determined whether evidence in contradiction of a witness is admissible, by considering whether the question, the answer to which is proposed to be contradicted, would be admissible if proposed by the party calling him. Such a party has, of course, the right to propose to his own witness any question which is relevant and material to the issue, and all evidence which is so relevant and material may be impeached by showing that the witness has at another time given a substantially different and contradictory account of the same transaction. But if the question is admissible only on cross-examination, it is merely collateral, and cannot be contradicted.

If the witness is asked to state what he has heretofore said upon any subject of inquiry, it would be open to objection as immaterial and irrelevant, and might be properly rejected. The proper question is, What do you now state under oath?

What any person has stated at some other time, when not under oath, is not competent to be received as evidence, whether it is sworn to by a third person or by himself. In either form, it is in effect but hearsay.

On a cross-examination, for the purpose of testing the memory or the honesty of the witness, questions may be asked relative to matters collateral to the issue, and the answers to which would be neither relevant nor material to the issue; but the party putting the questions must take the answers as they are given. He cannot introduce evidence to disprove them, nor to contradict the witness by his own previous statements.

This question is discussed very clearly and distinctly by Woods, J., in the case of *Seavy v. Dearborn*, 19 N. H. 355, which is directly in point, and decisive of this case. He there says: "But what Hills [a witness] said on a former trial, or otherwise, was not a proper subject of inquiry, and the judge who tried the cause, properly, on that ground, rejected the evidence offered to prove it. On that precise ground, it ought not to have been admitted at all.

"In the cross-examination of witnesses a great deal of latitude is allowed, for the purpose of testing the memory, the capacity, or the honesty of the person under examination; and for that purpose inquiries may be pushed, even to matters not positively material to the issue.

"But this license has various restrictions. In the first place, it does not extend so far as to authorize a party to prove by a witness, on cross-examination, things positively improper to be proved at all; and secondly, he cannot, for the purpose of discrediting a witness, contradict, by other evidence, his statements that are improper and immaterial. In other words, he may, for the purposes before indicated, ask questions not strictly relevant to the issue, provided they do not tend to elicit testimony that is injurious or improper. But when a question of either kind has been put and answered, the party cannot introduce other evidence to contradict the witness, whether for the purpose of discrediting him, or for any other purpose.

"It is a very plain corollary to that rule that a question, not otherwise material or proper, does not become so by force of any purpose of the examining party to make use of it to discredit the witness by contradicting his answer to it. The reasons assigned by writers for these rules are that a contrary course of proceeding would introduce issues in interminable

numbers, and perplex and harass litigants in questions which do not concern their cause.

"A witness, therefore, shall not be interrogated on a subject not pertinent to the issue for the mere purpose of contradicting him. If it was immaterial what Hills stated on a former occasion, it was still less germane to the matter, whether or not Bassett falsely testified to those irrelevant statements. The defendant had, therefore, no right to make the inquiry for such a purpose, and was improperly permitted to do so."

These positions are fully sustained by the authorities cited by the plaintiff.

The question here is, What evidence is, in this view, to be deemed merely collateral, irrelevant, or immaterial? In the case of *Attorney-General v. Hitchcock*, 1 Exch. 91, it was contended, on the authority of Starkie on Evidence, that the rule excluding evidence in contradiction of the witness's statements as to collateral or irrelevant matters does not exclude the contradiction of the witness as to any facts immediately connected with the subject of the inquiry. And Pollock, C. B., in delivering his opinion, said: "I think the expression, as to any matters connected with the subject, is far too vague and loose to be the foundation of any judicial decision. I am not prepared to adopt the proposition in those general terms, that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict the witness's testimony; and if it be neither of these, it is collateral to, though in some sense it may be considered connected with, the subject of inquiry."

And he lays down substantially the rule we have before stated: "The test whether the matter is collateral or not is this: If the answer of the witness is a matter which you would be allowed on your part to prove in evidence—if it had such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him."

The other case relied on, *Ware v. Ware*, 8 Greenl. 42, was decided entirely on the authority of 1 Stark. Ev. 134, and upon that passage of his work which is so distinctly disapproved by Pollock, C. B., in *Attorney-General v. Hitchcock*, 1 Exch. 91, as

too vague and loose; and we find ourselves compelled to dissent from it.

We have found no case which seems to sustain this decision but the recent case of *Commonwealth v. Hunt*, 4 Gray, 421, where it is said: "The rule which excludes all evidence tending to contradict the statements of a witness as to collateral matters does not apply to any facts immediately and properly connected with the main subject of inquiry. Everything which goes to affect the credit of the witness, as to the particular facts to which he is called to testify, is material and admissible: 1 Stark. Ev. 135; *Mechanics' & F. Bank v. Smith*, 19 Johns. 123."

This rule does not seem to improve the terms of Starkie, and the decision seems irreconcilable with *Commonwealth v. Buzzell*, 16 Pick. 157, and *Harrington v. Lincoln*, 2 Gray, 133. The last cases are in accordance with the authorities generally, and with the received text-books.

The question in the case before us was properly disallowed, and there must be judgment on the verdict.

ASKING QUESTION FOR PURPOSE OF DISCREDITING WITNESS: *Fries v. Brugler*, 21 Am. Dec. 52. As to what is necessary before contradicting witness, see *Tucker v. Welch*, 9 Id. 137, and note 141; note to *Blue v. Kibby*, 18 Id. 99; on the general subject of impeachment of witnesses: *Stevens v. Beach*, 36 Id. 359.

CHAPIN v. SULLIVAN RAILROAD.

[39 NEW HAMPSHIRE, 52.]

STATUTORY OBLIGATION OF RAILROAD COMPANY TO ERECT AND MAINTAIN

FENCE on each side of its track binds them to erect and maintain fences only as against cattle and other stock rightfully running upon the adjoining lands.

FENCES ALONG RAILROAD TRACK ARE FOR BENEFIT OF ADJOINING LAND-OWNERS, to prevent their cattle from escaping to the track and there getting killed, and to protect their crops from cattle rightfully on the railroad track.

RAILROAD COMPANY IS NOT BOUND TO MAINTAIN FENCES against cattle trespassing either upon lands adjoining their roads or upon their own track.

RAILROAD COMPANY IS NOT RESPONSIBLE FOR INJURIES HAPPENING ACCIDENTALLY TO CATTLE TRESPASSING on their track, or for depredations committed by cattle trespassing on their track and thence escaping upon adjacent lands, although it is the neglect of the company to maintain a sufficient fence that enables them to commit the depredations.

CASE. Certain cattle trespassed upon plaintiff's land, and he brought suit against defendant. The commissioner to whom the case was referred found that the railroad company failed to keep its fence along the railroad track in repair; that plaintiff also failed to keep his fences along the highway in repair; that cattle might enter the field damaged either from the highway directly or by going on the railroad track and thence to the field, but the latter way was the most natural and probable.

Stoughton and Grant, and Webster, for the plaintiff.

Wheeler and Faulkner, for the defendants.

By Court, FOWLER, J. This action is brought to recover damages which the plaintiff claims to have sustained to his lands adjoining the track of the defendants' railroad, by reason of the neglect of the defendants to erect and maintain sufficient fences between their railroad and those lands. The report of the commissioner finds the damages to have been occasioned by the ravages of cattle permitted by their owners to run at large upon the public highway, and which escaped from the highway upon the defendants' railroad, and thence into the plaintiff's rye-field, one of the tracts of land to recover damages for injury to which this suit is brought.

It is quite clear, upon the authority of numerous decisions in this state as well as elsewhere, that the cattle mentioned by the commissioner were wrongfully upon the highway and wrongfully upon the defendants' railroad; and therefore, so far as the damages to the rye-field are concerned, the case distinctly raises the question whether or not a railroad corporation is responsible for the damages occasioned to the owner of lands adjoining their road, by the depredations of cattle wrongfully upon their track and escaping therefrom into the lands of such adjoining owner, in consequence of their neglect to erect and maintain sufficient fences between their railroad and those lands.

As respects the damages to the plaintiff's pasture, we are aware of no principle on which, under the state of facts found by the commissioner, the plaintiff can fairly claim to compel the defendants to pay him the amount thereof. The commissioner not only fails to find that the cattle committing the injury ever entered the plaintiff's pasture from the defendants' railroad, but he does expressly find that they would most naturally thus enter directly from the highway, and not by

passing first over the defendants' railroad. The inevitable conclusion, therefore, from the report of the commissioner, would seem to be that the damages to the pasture were committed by cattle which their owners suffered to run at large in the public highway, and which passed directly from that highway upon the plaintiff's land, so that the neglect of the defendants to erect and maintain sufficient fence between their railroad and this portion of the plaintiff's lands, in no way, directly or indirectly, contributed to the injury there sustained by the plaintiff.

In relation to the damages to the rye-field, as before suggested, the simple question is, Does the obligation of the railroad corporation to erect and maintain a sufficient and lawful fence on each side of their track, imposed by the statute (R. S. c. 146, sec. 6; Comp. Laws, 351; *Dean v. Sullivan R. R.*, 22 N. H. 316), bind them to the erection and maintenance of such fences only against cattle rightfully running against them, or against all cattle, even those trespassing on the adjoining lands, or upon their own track? We are entirely satisfied that only the former liability is imposed by the statute.

At common law, the proprietor or tenant of land was not obliged to fence it. Every man was bound to keep his cattle upon his own premises at his peril, and he might do this in any manner he chose: *Dovaston v. Payne*, 2 H. Black. 527; *Rust v. Low*, 6 Mass. 90, 99; *Jackson v. Rutland and Burlington R. R. Co.*, 25 Vt. 157, 158 [60 Am. Dec. 246]; *Wells v. Howell*, 19 Johns. 385; *Manchester S. & L. Railway v. Wallis*, 25 Eng. L. & Eq. 373; *Morse v. Rutland and Burlington R. R. Co.*, 27 Vt. 49; *Lafayette and Indiana R. R. Co. v. Shriner*, 6 Ind. 141; *Woolson v. Northern R. R. Co.*, 19 N. H. 267; *Indianapolis & C. R. R. Co. v. Binney*, 8 Ind. 402.

It has long been well settled that where the owners of adjoining lands are bound by prescription, agreement, or the provisions of a statute, to maintain partition fences, they are obliged to maintain them only against animals rightfully upon the adjoining closes, and not against cattle trespassing thereon: Same authorities cited above; and also *Lord v. Wormwood*, 29 Me. 282 [50 Am. Dec. 586].

So, too, where the owner of land is obliged by prescription or statute to maintain a fence against a highway, he is obliged to maintain it only against cattle rightfully upon the way: Same authorities; and *Stackpole v. Healey*, 16 Mass. 33 [8 Am. Dec. 121].

These principles have been repeatedly affirmed by the courts of this state: *Avery v. Maxwell*, 4 N. H. 36; *York v. Davis*, 11 Id. 241; *Page v. Olcott*, 13 Id. 399; and they seem to us as applicable to railroad corporations, considered as the tenants of their roadway, as to the other land-holders. In *Lawrence v. Combs*, 37 Id. 331, where the various authorities were carefully collected and fully examined, it was held that the defendant was not responsible for damages occasioned to the plaintiff's crops, by cattle escaping from the highway, where they were running at large upon the defendant's land, and thence through an insufficient fence which the defendant was bound to maintain, upon the land of the plaintiff, notwithstanding the provisions of section 12 of chapter 136, of the revised statutes, that "the party neglecting to build or keep in repair any partition fence which he is bound to maintain shall be liable for all damages arising from such neglect, and shall have no remedy for any damage happening to himself therefrom." It would seem quite clear that there could be no stronger or more extensive liability upon a railroad corporation, implied from the obligation to maintain fences, than is expressed in relation to adjoining land-owners in the explicit and forcible language of the statute we have quoted. We can conceive of no sufficient reason why, if land-owners, bound by statute to support partition fences, and expressly made responsible for all damages happening to adjoining owners by reason of their neglect to do so, are held to be only responsible for damages occasioned by cattle rightfully running against such fences on the one side and the other, railroad corporations should be held to another and different rule.

The question before us has, however, as we think, been substantially determined in several reported decisions in this state, as well as elsewhere.

In *Woolson v. Northern Railroad*, 19 N. H. 267, it was held that a railroad corporation was not liable for damages done by their engines and cars to cattle which escaped from the highway upon the railroad track, because such cattle, while thus upon their track, were wrongfully trespassing upon the corporation.

In *Towns v. Cheshire Railroad*, 21 N. H. 363, it was expressly decided that railroad corporations were not bound, under the statute, to make or keep fences, except against the lands of adjoining owners, and cattle rightfully thereon, and not against cattle escaping from a highway and trespassing upon the track of the railroad.

In *Cornwall v. Sullivan Railroad*, 28 N. H. 161, it was determined that railroad corporations were required by statute to maintain sufficient and lawful fences on the sides of their roads, for the protection of the adjoining land-owners and all those who are rightfully in possession of the adjoining lands, except where they had settled with and paid those adjoining owners for building and maintaining such fences; but that they were under no obligation at common law, or by statute, to fence their roads for the benefit of trespassers.

The like doctrine has been held in other jurisdictions. Thus in *Perkins v. Eastern & B. M. R. Co.*, 29 Me. 307, it was decided that railroads were not bound, under the statute of Maine, similar to that of New Hampshire on the same subject, to build and maintain fences on the line of their road through common and uninclosed lands. So in *Picketts v. East and West India and Birmingham Junction Railway*, 12 Eng. L. & Eq. 520, it was held that the defendants were not liable to maintain fences against cattle trespassing on a close adjoining their road. In this last case, it was expressly said, by Chief Justice Jervis, in delivering the opinion of the court, that the act of parliament requiring railroad companies to fence their roads had imposed upon them just the same liability as by law existed upon the owners of adjoining lands in regard to maintaining partition fences between themselves, and no other. In this opinion all the other judges concurred. And in *Hurd v. Rutland and Burlington Railroad*, 25 Vt. 124, it is said: "The defendants, under the provisions of the act [requiring them to fence both sides of their road], are required to build and maintain a fence for the purpose of keeping the cattle of owners of adjacent lands from the premises and track of the road." Again, in *Jackson v. Rutland and Burlington Railroad*, Id. 151 [60 Am. Dec. 246], Chief Justice Redfield says: "This enactment [the provision requiring them to maintain fences] only places the defendants in the position of an adjoining proprietor." See Redfield on Railways, 2d ed., 375, 376, and notes.

We have therefore no hesitation in holding that, under the existing statutes of this state, railway companies are only bound to maintain fences on both sides their track for the benefit of the owners and rightful occupants of adjoining lands, to prevent the cattle of such owners or occupants from escaping from the adjoining lands upon the track of their roads and there getting killed, or wandering astray, and to protect the crops, grass, herbage, and other productions of such adjoining lands

from the depredations of animals rightfully upon the railroad track. If, for example, the cattle rightfully upon an adjoining close should escape upon the railroad track, by reason of the neglect of the railroad to construct and maintain a sufficient fence between their track and such adjoining close, they would be rightfully there, and the railroad corporation responsible not only for any injury done them by their own trains, but for any damages done to the crops of any other adjoining close into which they might escape by reason of like negligence of the corporation in neglecting to erect and maintain a lawful and sufficient fence between their road and such other adjoining close, as well as for any loss or damage happening by reason of such cattle straying upon the highway or elsewhere. But railroad corporations are not bound, any more than individual land-owners, to erect and maintain fences against cattle trespassing either upon lands adjoining their roads or upon their own tracks; nor are they responsible for injuries accidentally happening to cattle trespassing on their tracks, or for the depredations committed by such cattle so trespassing on their tracks, and thence escaping upon adjacent lands, although they might not have thus escaped or committed those depredations but for the neglect of the corporation to maintain sufficient fences.

Entertaining these views, we are of opinion that the plaintiff cannot sustain his action for any portion of the damages claimed by him, and there must be judgment for the defendants upon the commissioner's report.

Judgment for the defendants.

DUTY OF RAILROAD COMPANY TO KEEP ITS TRACK ENCLOSED: See *Whitney v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 103, and collected cases in note to same 106; *Sullivan v. Philadelphia etc. R. R.*, 72 Id. 698.

RAILROAD COMPANIES IN SOME STATES ARE REQUIRED TO ERECT FENCES AND CATTLE-GUARDS, and maintain them in such a manner as to prevent horses, cattle, and other animals from passing upon their track: *Trow v. Vermont etc. R. R. Co.*, 58 Am. Dec. 191; *Norris v. Androscoggin R. R. Co.*, 63 Id. 621.

LIABILITY OF RAILROAD COMPANY FOR INJURING ANIMALS TRESPASSING ON RAILWAY TRACK, WHERE COMPANY IS BOUND TO FENCE and maintain cattle-guards: *Trow v. Vermont etc. R. R. Co.*, 58 Am. Dec. 191; *Norris v. Androscoggin R. R. Co.*, 63 Id. 621; *Whitney v. Atlantic & St. Lawrence R. R. Co.*, 69 Id. 103; *Broune v. Providence etc. R. R. Co.*, 71 Id. 736; cases collected in note to *Peru etc. R. R. Co. v. Hasket*, Id. 336; *Munger v. Tonawanda R. R. Co.*, 53 Id. 384; *Jackson v. Rutland & B. R. R. Co.*, 60 Id. 246; note to *Chicago etc. R. R. Co. v. Patchin*, 61 Id. 71; *Murray v. South Carolina R. R. Co.*, 70 Id. 219; note to *Tonawanda R. R. Co. v. Munger*, 49 Id. 268-272, where the question is discussed at length.

PROVISION IN CHARTER OF RAILROAD COMPANY REQUIRING IT TO FENCE ITS TRACK is for the benefit of the adjoining land-owners only: *Jackson v. Rutland and Burlington R. R. Co.*, 60 Am. Dec. 246.

THE PRINCIPAL CASE WAS CITED in *Mayberry v. Concord R. R.*, 47 N. H. 394, and *Giles v. Boston and Maine R. R.*, 55 Id. 553, to the point that railroad corporations are not bound, either at common law or by statute, to fence their roads for the benefit of trespassers, nor against any except adjoining land-owners.

KIMBALL v. FISK.

[30 NEW HAMPSHIRE, 119.]

IRREGULAR AND ERRONEOUS PROBATE COURT PROCEEDINGS, in appointing guardian of insane person, are not void if the court has jurisdiction of the subject-matter.

WANT OF NOTICE IN APPOINTMENT OF GUARDIAN renders the proceedings voidable as to parties injured, but not void.

DEFECTIVE INQUISITION OF PARTY AS TO HIS SANITY, in which the selectmen actually find as to his condition, cannot be treated as a nullity.

APPOINTMENT OF GUARDIAN OF INSANE PERSON WITHOUT DECREE that he is insane, is not valid.

MERE NEGLECT TO RECORD DECREE THAT PERSON IS INSANE will not render an appointment of a guardian for him void. The court may amend the record by entering up such a decree from recitals of it in other papers, upon proper notice to the parties interested.

PROBATE COURTS HAVE GENERAL JURISDICTION OF THOSE SUBJECTS to which their powers extend, and are entitled to all the presumptions in favor of their proceedings which are allowed other tribunals of general jurisdiction.

CONSTITUTION REQUIRING PROBATE COURT TO BE HELD ON CERTAIN DAYS, but containing no negative words, does not divest the probate judge of authority to hold court on any other days.

PROBATE COURTS HAVE POWER TO ADJOURN whenever they deem it necessary for the transaction of business.

TROVER. The overseers of-Whitefield, believing plaintiff herein to be insane, petitioned to the probate court to cause an inquisition to be made in the matter, and that a guardian be appointed for him. The inquisition was ordered, and the selectmen returned that they had "made personal examination and careful inquiry into his condition, and in our opinion said Thomas H. Kimball is an insane person." Defendant was appointed guardian of plaintiff, and plaintiff himself, in writing, joined in his nomination. No decree declaring plaintiff insane appeared of record, but the letters of guardianship recited that such a decree had been made. Defendant gave bonds, and took the property for which plaintiff brings suit, and denies that he was insane at the time of the proceedings.

Carpenter, for the plaintiff.

Burns and Fletcher, for the defendant.

By Court, BELL, J. Though the proceedings in this case are not such as we think they should have been, yet it by no means follows that they are void, or that they can be impeached when they are collaterally and incidentally brought in question.

The want of jurisdiction of the subject-matter renders the proceedings void: *State v. Richmond*, 26 N. H. 439. This case is not one of that class. By the general statute relative to the jurisdiction of judges of probate (R. S., c. 152, sec. 4.), it is provided that "such judge shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane persons, and spendthrifts."

The provisions relative to the appointment of guardians for the insane (R. S., c. 150, secs. 10, 11) are very brief. They provide that "upon application of any relative or friend of any insane person, or upon the like application of the overseers of the poor of the town in which such person lives, made to the judge of probate for the county in which such town is situate, that a guardian may be appointed over such person, the judge shall cause the selectmen of the town in which such person lives to make inquisition thereinto. If, upon the return of such inquisition and due examination had, it shall be decreed that such person is an insane person, the judge shall appoint a guardian over such person; but no such decree or appointment shall be made until such person shall have been cited to appear and show cause against the same."

Here the judge acted upon the application of the overseers of the poor of a town in which the supposed insane person lived, within his county, alleging his insanity, and praying that a guardian should be appointed. These are all the facts required by these sections to give to the court jurisdiction in cases of this kind, so far as the subject-matter is concerned. To render the proceedings regular, it is further required that there should be an inquisition and notice to the party; but the court must have jurisdiction of the subject-matter before either of these can be ordered.

Want of jurisdiction of the person of a party by the service of process or notice renders proceedings voidable, not void: *State v. Richmond*, 26 N. H. 241. They may be avoided by those who are injured, or who have just cause to complain, until they have

been confirmed; but the exception may be waived and the proceedings confirmed by the same parties at any time before they have been actually avoided. The record before us shows that proper notice was ordered, and a kind of notice was in fact given. But the provision of the statute is but in fact a repetition of a well-settled principle of the common law, and the want of the notice prescribed by both merely affected the regularity of the proceedings.

The statute required an inquisition. Here we find an order of the court for an inquisition, and a precept directed to the selectmen of the proper town, referring to the petition, stating that it represented the plaintiff as an insane person, and praying an inquisition, and that a guardian should be appointed, and directing them to visit him and make personal examination and inquiry as to his condition, and certify the same to the court. This is a most defective document, wanting almost everything that it ought to contain to guide the selectmen in the discharge of their duties—duties which it cannot safely be assumed they will know without instruction.

The return, or inquisition, shows that the selectmen visited the plaintiff, made a personal examination and careful inquiry into his condition, and they certify that in their opinion he is an insane person. This, too, is very deficient. It does not show, as it ought, how they performed their duties, that the court may judge whether they are properly performed, and both of them upon proper objections might have been set aside, either in the court of probate or upon appeal, because in a case involving the right to liberty and the control and enjoyment of a man's property nothing should be left to presumptions. It should appear that everything was done rightly and legally. But the selectmen here found the fact which the precept seems to require them to ascertain, that the plaintiff was insane. The papers thus contain the substance of what the law intended; and we are of opinion, as was held in *H— v. S—*, 4 N. H. 65, that they cannot be treated as nullities; and for the same reason the decrees of the probate court are not made void by this defect: *Raymond v. Wyman*, 18 Me. 386.

There does not appear to be any formal record of a decree that the plaintiff was a person of unsound mind; and it is contended that without such a decree there can be no valid appointment of a guardian. And we think that is clearly so, not only from the nature of the case, but from the terms of the statute before cited. But the defect here seems not to be the

want of such a decree, but rather the neglect to make a proper record of it. The record of the letter of guardianship contains a recital of such a decree, and the application for the appointment of the defendant as guardian distinctly admits it; and we think there can be no doubt of the power of the court to amend the record by entering up such a decree, nor of the propriety of its exercise upon proper notice to parties interested: *Remick v. Butterfield*, 31 N. H. 70 [64 Am. Dec. 316].

The plaintiff was the party chiefly affected by these proceedings, and though they are wisely designed as well for the safety of all who may have occasion to deal with the party or his guardian as for his own security, yet, so far as they affect the party himself, he may waive the exception, if he has capacity; and this we think must be regarded as effectually done in this case by the petition of the plaintiff for the appointment of the defendant as his guardian, if we should assume, or it should be proved, as the plaintiff now asserts, that he was then of sound mind.

In the argument, it has been suggested that the courts of probate are courts of merely statutory, special, and limited jurisdiction, and this view is expressed in some books to which we are accustomed to look as authority; but we are much inclined to question the soundness of the opinion. The powers of courts of probate were conferred in Massachusetts on the county courts, and in some cases on special commissioners, while New Hampshire was subject to that colony, but they were conferred as a body of well-known principles and rules; a settled and general jurisdiction then existing at common law in the ordinary or ecclesiastical courts. The statutes of the colony did not attempt to define or prescribe the powers of those courts in general, otherwise than by a reference to the existing law of the land. The like state of things has continued from that day to the present. The jurisdiction of probate courts has been vested in different officers at successive periods in the history of the province; but, excepting in a few cases, the general system of probate jurisdiction has remained as defined at common law. The legislature have attempted to correct many errors into which ill-informed judges have fallen, so that now many matters are regulated partly by common law and partly by statute, though the general system is that of the common law. The jurisdiction of probate courts was at common law restricted to proceedings relative to the estates of persons deceased. Here, by statute, many other branches of

authority have been added, but always with a reference to the common law and the course of proceedings in England in the courts in which the like jurisdiction was vested. Such are the distribution of insolvent estates, the appointment of guardians of minors and insane persons, trusts and trustees, division of estates, etc. Several of these were well-known powers exercised by the court of chancery.

As to all these, we think it might be contended that the courts of probate, and this court, which is the supreme court of probate, and derives its whole authority from statutes, stand on the same ground. They are not to be regarded as courts of special and limited jurisdiction, but as courts of general jurisdiction on these subjects, and entitled to all the presumptions in favor of their proceedings, which are allowed in the case of other tribunals of general jurisdiction, more especially as they are now made, by statute, courts of record.

In the case of *H— v. S—*, 4 N. H. 65, the broad position was taken by eminent counsel that the courts of probate were required by the constitution to be held on fixed days appointed by law. The argument was strongly pressed, and though the court, in their decision, made no reference to that point, yet they gave to it their countenance in some degree by publishing it in the reports; and much of the legislation of the state has taken its shape from the doubts created in many minds by that argument. It is here contended that these proceedings are void, because by law no court was appointed to be held upon the twenty-first and twenty-fifth of June, A. D. 1852, when these proceedings were had. But we find great difficulty in reaching the conclusion that this objection is well founded.

By the common law, courts of probate and chancery are always open for the transaction of business; and it does not seem necessarily to be inferred from the language of the constitution that it was intended to limit and confine the jurisdiction of probate courts so that they would have no authority to act, except on the days fixed by law. For the convenience of the people it would seem to have been intended that probate courts should be held on fixed days, and at fixed places, where all might conveniently attend; but it does not seem to have been necessary for any purpose apparently in view to divest the judge of his authority at all other times and places. There are no negative words declaring that the powers of the courts shall not be exercised at other times and places, and

the jurisdiction of courts is not generally taken away, unless the language imports that the jurisdiction is not longer to be exercised.

We understand that, from the adoption of the constitution till now, it has been the practice of the courts of probate to receive petitions and issue orders of notice, to appoint administrators and guardians, and to do many other acts, substantially of a formal character, at other than probate days. All these, still, are judicial acts, and require the authority of the court to be exerted; and we think great inconvenience would be caused if no order of notice or the like could be issued but upon a regular court day.

Since the case of *H— v. S—*, 4 N. H. 65, the statutes have been much modified, and by the revised statutes, c. 152, sec. 16, "the judge may adjourn his court for the trial and decision of any matter pending before him to any convenient time and place." It is contended that this statute confers no power upon the court to adjourn for the transaction of its official duties generally, but merely enables it to adjourn for the trial of cases then pending before it. But this seems to us a narrow and rigid construction. It seems more reasonable to hold that if the business before the court requires an adjournment, the court may adjourn, but when the court is opened in pursuance of the adjournment, it is open for the transaction of any business, as on the regular days appointed for its sittings. Any other construction would be attended with great practical inconvenience in those counties where the business is occasionally too much to be completed in a day, and adjournments are necessary to complete it.

Courts of probate have, we think, as incident to their character of courts, the power of adjourning whenever they deem it necessary for the transaction of their business: Com. Dig., tit. Courts, 11; *Swinstead v. Lyddal*, 1 Salk. 408; and we think it ought not to be inferred, from the fact that the legislature have conferred the same power by statute, in some qualified form, that it was designed to limit the general power ordinarily incident to courts of justice. It would be more reasonable to suppose that it was merely intended to obviate a doubt such as we have referred to.

If it should be regarded as irregular that business should be done by the judge of probate on days not appointed by the law, still this is hardly to be regarded as a matter affecting the jurisdiction of the court over the subject-matter. If the

proceedings would be set aside on motion, seasonably made in the probate court, or in this court on appeal, still the court has not acted beyond its jurisdiction. The defect is one not necessarily fatal, since it may be waived or released; and consequently, so long as the proceedings remain, and are not set aside on motion or appeal, all parties are bound by them, and they cannot be treated as nullities, when they are incidentally brought in question.

Upon the facts appearing in this case, the defendant has a perfect defense to the action.

MERE IRREGULARITIES IN PROBATE PROCEEDINGS DO NOT INVALIDATE THEM, if the court acquired jurisdiction: See notes to *Dancy v. Stricklinge*, 65 Am. Dec. 185; *Bloom v. Burdick*, 37 Id. 309.

PROBATE COURTS ARE GENERALLY HELD TO BE OF SPECIAL AND LIMITED JURISDICTION: *Bloom v. Burdick*, 37 Am. Dec. 299, and note 308; *Grimes's Estate v. Norris*, 65 Id. 545; *Wyatt's Adm'r v. Rambo*, 68 Id. 89; *Haynes v. Meeks*, 70 Id. 703, and cases collected in note thereto 709. On the other hand, they have been held to be courts of general jurisdiction: *Bush v. Lindsey*, 71 Id. 117; *Tucker v. Harris*, 58 Id. 488; *Shultz v. Shultz*, 60 Id. 335; *Powell v. North*, 56 Id. 513. In *Morrow v. Weed*, 66 Id. 122, it was made a *quære* as to whether such courts were inferior or not, and the matter was there discussed: See also note to *Worthy v. Johnson*, 52 Id. 407; *McWillie v. Van Vactor*, 72 Id. 127.

POWER OF COURTS TO AMEND RECORDS: See note to *Remick v. Butterfield*, 64 Am. Dec. 323; *Hill v. Hoover*, 68 Id. 70, and collected cases in note thereto 72.

EFFECT OF INQUIRY AS EVIDENCE: *Den v. Clark*, 18 Am. Dec. 417; note to *L'Amoreux v. Crosby*, 22 Id. 659; note to *Hutchinson v. Sandt*, 26 Id. 127; note to *Matter of Desilver*, 28 Id. 647; *Gangwere's Estate*, 53 Id. 554, and cases cited in note thereto 561.

APPOINTMENT OF GUARDIAN OF INSANE PERSON WITHOUT NOTICE, EFFECT OF: *Davison v. Jehonnot*, 41 Am. Dec. 448; *Hutchins v. Johnson*, 30 Id. 622; *McCurry v. Hooper*, 46 Id. 280; *Rogers v. Walker*, 47 Id. 470; *Belava v. Lepretre*, 56 Id. 266.

BAY STATE IRON CO. v. GOODALL.

[39 NEW HAMPSHIRE, 223.]

COURT OF CHANCERY MAY ENTERTAIN BILL FOR DISCOVERY of all a man's estate, legal and equitable, and may make all proper decrees to subject the same to the execution of his creditors.

JUDGMENT CREDITOR MAY DEMAND OF HIS DEBTOR, in general terms, a disclosure of his assets and of the names of his debtors.

BILL IN EQUITY SHOULD BE FILED IN COURT WHERE ONE of the parties resides, if both reside within the state; but if the plaintiff does not reside within the state, the bill may be brought in any county therein at his election.

CORPORATION CANNOT BE REGARDED AS RESIDING IN NEW HAMPSHIRE, where it has its place of business in Massachusetts, and is organized under the laws of the latter state.

BILL OF DISCOVERY MAY BE FILED AGAINST DEFENDANT ALONE, notwithstanding the statute provides that such a bill may be filed "against the defendant and other persons," etc.

RETURN OF UNSATISFIED EXECUTION MAY BE MADE by sheriff of the county in which the defendant resides.

DEMURRER TO BILL FOR DISCOVERY ON GROUND THAT ANSWERS TO INTERROGATORIES MIGHT SUBJECT defendant to a criminal prosecution will not be sustained.

WHERE DISCOVERY MIGHT SUBJECT DEFENDANT TO CRIMINAL PROSECUTION, he may, in his answer, insist that he is not bound to make any such discovery.

EQUITY. Plaintiff, a corporation of Massachusetts, got judgment against defendant in Hillsborough, New Hampshire. A writ of execution was delivered to the sheriff of Grafton for service. It was returned by said sheriff unsatisfied. Defendant resided in Grafton, which was in the fifth judicial district. Plaintiff filed a bill for discovery in the second district, alleging that defendant had a large amount of property, part of which was held in trust for him; that he had conveyed and concealed the same, etc. The bill prayed an answer to various interrogatories of a general nature regarding defendant's property, his creditors, etc., and asked that his judgment might be satisfied out of the property discovered. Defendant demurred to the bill, on the ground that he could not answer the interrogatories, because it might subject him to certain pains and penalties. He also demurred to the relief sought, because: 1. The fifth only, and not the second, judicial district court had jurisdiction; 2. The bill was filed against defendant alone; 3. No sufficient equity was shown to entitle plaintiff to relief; 4. The subject was not within the jurisdiction of a court of equity; 5. The execution was not delivered to the sheriff of the county where the suit was brought.

S. N. Bell and H. Foster, for the plaintiff.

C. R. Morrison, for the defendant.

By Court, BELL, C. J. It was formerly held to be within the jurisdiction of the court of chancery in England to entertain a bill for discovery in aid of an execution at law. The authorities which support this position are found collected in *Bayard v. Hoffman*, 4 Johns. Ch. 453; *Brinckerhoff v. Brown*, Id. 677; *Hadden v. Spader*, 20 Johns. 562. Since these decisions, the law has been considered settled in this

country in favor of this equitable jurisdiction, though the current of authority in England, since 1790, is said to be adverse to this proceeding: *Gordon v. Lowell*, 21 Me. 251; *Bigelow v. Congregational Society*, 11 Vt. 283; *Waterman v. Cochran*, 12 Id. 699; and see numerous cases collected in 1 U. S. Eq. Dig., tit. Debtor and Creditor, 3.

In the case of *Tappan v. Evans*, 11 N. H. 311, the subject was ably considered by Chief Justice Parker, and the question must be considered as settled here. "The general principle deducible from the authorities," says the learned chief justice, "is that where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien on the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law, exhausted by an actual return upon his execution, that no goods or estate can be found (which is pursuing his remedy at law to every available extent), before he can file a bill to reach the equitable property."

The remedy in equity in the first of these classes of cases is distinctly recognized in *Dodge v. Griswold*, 8 N. H. 425, as well as the principle that relief will be afforded only where a specific lien has been obtained; and in *Stone v. Anderson*, 26 Id. 506, where it is held that an attachment alone is a sufficient lien.

Where the property has not been levied on by execution, or where it is of such a nature that it could not be levied upon or reached by an execution at law, the return of the execution unsatisfied will not, of itself, give the creditor a specific lien upon the trust property or choses in action of the debtor. He must follow up his execution by the commencement of a suit in equity, or do some decisive act showing an intention to pursue the fund, to gain a specific lien: *Word v. Pierce*, 9 Cow. 728; *Tappan v. Evans*, 11 N. H. 328.

In this proceeding, the complainant is entitled to a discovery of all the real estate on which he had acquired a lien by his proceedings at law, and of the nature and character of the incumbrances upon it, and of the conveyances of it; that, if fraudulent, they may be removed by a decree, and the plaintiff may be enabled to reach it by an execution at law. He is also entitled to a discovery of all the property, both real and

personal, now owned by the defendant, wherever it may be situated; that if within the state, it may be reached by an execution, and if elsewhere, or if such that it cannot be taken on execution, as trust funds, choses in action, stocks, etc., the defendant may be compelled, by an order of the court, to transfer the property by a proper conveyance to a receiver, to be sold and applied to the payment of the complainant's debt. He has a right to a full discovery from the defendant of every trust created for his benefit, that the court may see whether it is one on which his creditors have any equitable claim for the satisfaction of their debts: *Le Roy v. Rogers*, 3 Paige, 234.

If it was possible to entertain a doubt of the authority of the court, as a court of equity, under its broad general powers, in all cases of fraud and trust, to require a full discovery of all a man's estate, legal and equitable, and to make all proper decrees to subject the same to the execution of his creditors, that doubt is effectually removed by the statute of July 2, 1845: Laws of 1845, c. 234; Comp. Stats. 436. It enacts that "when-ever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in the superior court of judicature, against such defendant and any other person, to compel the discovery of any property or thing in action belonging to the defendant, or any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant; except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgment out of any property, money, or things in action belonging to the defendant, or held in trust for him, with the exception before stated, and of property specially exempted from attachment and execution, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law, or not."

We are unable to perceive that the statute enlarges in any way the remedies of parties, or the powers of the court as they existed before, upon the well-defined principles of equity jurisdiction; but the existence of such a statute removes all doubt

upon two of the causes of demurrer to the relief asked by the bill; namely, because no equity is shown in the bill such as to entitle the plaintiff to relief, and because the subject is not within the jurisdiction of a court of equity.

On the first reading of the bill, we were inclined to doubt whether a bill so general, inquiring as to all a man's property, both at the present time and at the time the judgment was recovered, and as to all his dealings and transactions with it since the judgment, could be sustained. It seemed as if the attention of the court should be drawn to some specific property or interest as to which some fraud, or trust, or liability to the payment of the plaintiff's debt, should be specially alleged. And such seems to be the more usual form of bills of this kind, so far as we have been able to gather the form of the bill from the cases reported. In many of these cases, it would seem that in addition to the special averments as to the particular property, there are general averments that the defendant has estate, real and personal, choses in action, etc.: *Le Roy v. Rogers*, 3 Paige, 234; *Edmeston v. Lyde*, 1 Id. 637; *Clarkson v. De Peyster*, 3 Id. 320.

Our doubts on this point have been removed by the decision of the court in *Le Roy v. Rogers*, before cited, where a demurrer to so much of a bill, charging in general terms the possession of real and personal estate, money, bank stock, insurance stock, and choses in action, though accompanied by special allegations as to certain property, as related to the discovery of any or all of the property and effects which the defendant had at the time of making the covenant on which the plaintiff's action was founded, was overruled, on the ground that a decision sustaining it would operate to exonerate the defendant from discovering any of that property which he still held, or others held in trust for him; and the court held, as before stated, that the plaintiff was entitled to a discovery of all property held in trust for him, of all real estate and personal property subject to execution, or which could be reached by an order of court.

In Brightly's Equity Jurisprudence, 392, in discussing bills of this class, it is laid down that the bill should set forth that there is reason to believe that the defendant has real and personal estate wherewith the judgment may be satisfied; that such real estate has been conveyed, transferred, or incumbered, and said personal estate has been removed, transferred, or concealed, etc. At page 678, a form of a bill of this kind

is given, where the allegations are as broad as in the present bill; that the defendant has real and personal estate where-with the said judgment may be satisfied; that such real estate has been fraudulently conveyed and transferred; and such personal property has been removed, transferred, and concealed, with intent to prevent the same being made liable for his debts.

Two cases are cited in the United States Equity Digest, tit. Debtor and Creditor, iii., to the point that a judgment creditor may demand from his debtor a disclosure of his assets, and of the names of his debtors, in general terms: *Myers v. Zanesville & M. Turnpike Co.*, 11 Ohio, 273; *Cadwallader v. Granville Soc.*, Id. 292.

A form of creditor's bill, as general as that in this case, was commonly used in New York before the new code of practice. As we find no decision prescribing any limitation to the form of the inquiries, as the statute is in terms very general, and the case must be frequent where none other than general inquiries can be made, we are satisfied there is no just foundation for this objection.

The other grounds of demurrer to the relief sought are, first, the want of jurisdiction of the court in the second judicial district, the defendant residing in the fifth.

We have no statute prescribing the county in which equitable proceedings shall be commenced. The jurisdiction in such cases is given to the supreme judicial court, without reference to the county or district in which it may be sitting. By analogy to the course in actions at law, we may properly hold that bills in equity should be filed in the county where one of the parties resides, if both reside within the state; but if the plaintiff does not reside in the state, the bill may be brought in any county at his election. The plaintiff here, being a corporation organized under the laws of Massachusetts, and having its place of business in Boston, cannot be regarded as residing here.

The second ground of demurrer is because the bill is filed against the defendant alone. This objection is founded on the language of the statute of July, 1845—"may file a bill against the defendant and any other person to compel a discovery," etc. The argument is, that as the statute speaks of the defendant and any other person, the bill must be brought against two persons at least, and cannot be maintained against the debtor alone.

This bill, though authorized by statute, is founded on established principles of equity, and by the general rules governing equity proceedings, it might be filed against the defendant in execution alone, or against him and others. It can hardly be assumed that the legislature could have intended to narrow the jurisdiction of the court by merely affirmative words. If not, the bill would still be well sustained under the general equity powers of the court. The statute is very briefly expressed, and must be construed with reference to its object, rather than according to its strict grammatical construction. In terms, the statute authorizes the filing of a bill against such defendant and any other person, to compel, etc. This is not to be understood literally. It is not meant that such a bill may be filed against any one. It must be construed, any other person legally liable, and thus understood, it will be seen that it is incapable of the restrictive meaning claimed for it. "May file a bill against the defendant and any other person legally liable," does not in the least imply that it may not be brought against the defendant alone. It would be consistent, too, with the received principles of interpretation that "and" should be construed "or" as well as "and," and thus to authorize a proceeding against both or either of the parties, as the case might require, especially as there must be many cases within the apparent scope and design of the statute which would otherwise be excluded from its operation. Such would be all that class of cases where the defendant might have money, choses in action, etc., in his own hands, with which no other person had interfered.

In the plaintiff's argument, it is insisted that whenever a demurrer is put in for want of proper parties, it must show who are the proper parties, from the facts stated in the bill; not indeed by name, for that might be impossible, but in such a manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties. So is the rule laid down in Story's Eq. Pl., sec. 503; Daniell's Ch Pr. 619, note; *Dias v. Blanchard*, 10 Paige, 454; *Robinson v Smith*, 3 Id. 230 [24 Am. Dec. 212].

Where it is not apparent from the bill itself that necessary parties are omitted, it can be taken advantage of only by a plea or answer showing who are the necessary parties: *Robinson v. Smith*, 3 Paige, 230; *Mitchell v. Lenox*, 2 Id. 280. It is here apparent that though it may be held that other parties are required, yet nothing can be learned from the bill of the

names of such parties, or of any description by which the plaintiff may correct his bill.

The case, too, falls within an exception stated in Mitford's Pleading, 146, and which is recommended by its good sense. "If the bill seeks a discovery of the parties interested, a demurrer for want of necessary parties will not hold:" 1 Daniell's Ch. Pr. 619.

The third and fourth causes of demurrer have been fully discussed.

The fifth cause is that the execution on the judgment has not been delivered to any sheriff in this judicial district. The language of the statute is, "whenever an execution shall have been issued, etc., and shall have been returned unsatisfied, in whole or in part." There is nothing defining the county into which the execution must have issued; and if we resort to the decisions founded on the general principles of equity, we shall find they go no further than to require that the execution should have issued into the county in which the defendant resides: *Child v. Brace*, 4 Paige, 309; *Thayer v. Swift*, Harr. (Mich.) 439. The execution in this case was issued into the county of Grafton, in which the defendant resided, and no suggestion is made that there was anything fraudulent or collusive in the return.

The demurrer to the discovery sought by the bill rests on the ground that the answer to the parts of the bill covered by the demurrer might subject the defendant to criminal accusations, and to pains and penalties. This ground of demurrer is set up separately to two classes of inquiries: 1. To the parts of the bill which seek a discovery as to the nature and amount of the property which the defendant has, either legal or equitable, how it is situated, how incumbered, its value, and the like.

We are aware of no law by which the owner of property is subjected to any penalties, whatever may be its nature, situation, description, or character; and the same is true as to his debts and choses in action, and property held in trust for him. We can hardly imagine any pertinent and proper answer to any one of this class of inquiries by which a party could be exposed to any penalty, and the demurrer, as to these, cannot be sustained.

The second class of inquiries to which this ground of demurrer applies relates to the disposition of the property which the defendant had at the commencement of the plaintiff's

action at law and since; what conveyances he has since made; how and when they were made, and on what considerations; and what transfers and arrangements of his property he has made, etc.

It is not alleged or suggested in the bill that any of these conveyances have been so made as to subject the party to a criminal prosecution or forfeiture. On the face of the bill nothing of that kind appears, and the court, upon a demurrer, cannot assume that any other facts exist than those alleged. The object of the demurrer is to obtain a decision, whether, upon the facts as they are stated, the plaintiff shows a good cause of action; and the demurrer will not be sustained unless it appears clearly that the bill must be dismissed upon a hearing. Now, it is evident that all the interrogatories may be answered by the defendant if his dealings with his property have been correct, without raising any questions in the criminal law. He may have had a great estate, legal and equitable, real and personal, in possession and in action, and he may now be wholly destitute or have conveyed away the whole of it. It may all have been applied to the payment of debts, or lost by fire, or casualty, or speculation; or it may have been fairly and honorably disposed of otherwise, and be now existing in other and perhaps more eligible forms without the least imputation of illegality or dishonesty. The court cannot presume that all a man's dealings with his estate have been illegal, and such as the law will punish even if he suggests it himself.

So far as the demurrer is to be regarded as setting up and alleging that the defendant's transactions with his property have been all or any of them illegal and punishable, it is a speaking demurrer, which for that reason cannot be sustained: Daniell's Ch. Pr. 656, and notes.

But if it were true that the answers to some of the inquiries in either of these classes must be such as to subject the defendant to penalties, the demurrer cannot be sustained, if it appears that any inquiries material to the case may be answered without such hazard, because it is a familiar principle that a demurrer cannot be good as to a part of what it covers and bad as to the rest: Daniell's Ch. Pr. 651, notes.

As to this question, the case of *Burns v. Hobbs*, 29 Me. 273, is much in point. It was a bill for discovery, and to set aside a mortgage alleged to be fraudulent, against a levy of the plaintiff. It was held that the defendant could not, by demurrer,

avoid answering and discovering the date of the execution of his mortgage, and whether he claimed to hold the premises by virtue of it, or from discovering and producing the note, if within his power, or from stating when, where, in whose presence, and for what, such note was given, etc. All this, it is said, may serve to enable the court to come at and adjust the rights of the parties, and it may all be consistent with the plaintiffs' claim under the mortgage. We cannot presume that an answer to such portions of the bill as call for this discovery will impeach or impair the defendant's title: See *Le Roy v. Rogers*, 3 Paige, 234.

We should hesitate in arriving at this result—that the demurrer must be overruled—if we did not regard the rule as well settled that where the defendant cannot make a discovery of the facts upon which relief is asked, without subjecting himself to a criminal prosecution or forfeiture, he may, in his answer, insist that he is not bound to make any discovery that may subject him to a forfeiture; this being an exception to the general rule that the defendant cannot by answer object to answer as to any particular matter of which a discovery is sought in the bill: *Lube's Eq. Pl.* 324; *Welsby's Eq. Pl.* 359; *Livingston v. Tompkins*, 4 Johns. Ch. 432; *Livingston v. Harris*, 3 Paige, 537.

Demurrer overruled.

COURT OF CHANCERY HAS POWER TO COMPEL DISCOVERY OF DEBTOR'S PROPERTY, so that it may be applied in satisfaction of his debts: *Mitchell v. Bunch*, 22 Am. Dec. 669; equitable interests are subject to the payment of such debts: *Withers v. Carter*, 50 Id. 78; *Lang v. Brown*, 56 Id. 244; though the mode of procedure for the relief of the creditor is different from that against legal estates: *Heath v. Bishop*, 55 Id. 654. The creditor must pursue such interests in a court of chancery, as they are not subject to execution at law: *Rice v. Burnett*, 42 Id. 336, and collected cases in note thereto 345; and the creditor must first have a judgment and execution unsatisfied before he can maintain a bill in equity to subject such interests to the payment of his debts: See note to *Withers v. Carter*, 50 Id. 83. See also, on the general question as to the subjection of equitable interests to the payment of creditors' debts, *Dargan v. Waring*, 46 Id. 234; *McLure v. Benceni*, 40 Id. 437. As to creditors' bills against insolvent corporations, see note to *Morgan v. N. Y. R. R. Co.*, Id. 249.

FOR JURISDICTIONAL PURPOSES, RESIDENCE OF CORPORATION is at its chief place of business: See *Wood v. Hartford Fire Ins. Co.*, 33 Am. Dec. 395, and numerous cases cited in extended note thereto 399, 400; note to *Ringgold v. Barley*, 59 Id. 113. Corporation is a resident of the state creating it: See note to *City of New Albany v. Meekin*, 56 Id. 531.

DEFENDANT IN EQUITY IS NOT BOUND TO MAKE ANY DISCOVERY in answering a bill that would subject him to a criminal prosecution. It must appear,

however, from the bill or plea that his answers would subject him to punishment: *Wolf v. Wolf's Ex'r*, 18 Am. Dec. 313. No person is obliged to answer matter of scandal, nor to make discovery of that which may subject him to a forfeiture or penalty; but "scandal" is here used in a technical sense, and is applicable to crime only: *Skinner v. Judson*, 21 Id. 691.

HILL v. McINTIRE.

[30 NEW HAMPSHIRE, 410.]

WARD MAY FILE BILL IN EQUITY TO RECOVER SUCH PART OF HIS ESTATE as he can trace, without instituting any proceedings at law, where the estate of his guardian is insolvent, and his sureties irresponsible.

PERSON RECEIVING PROPERTY OF WARD FROM GUARDIAN WILL BE DEEMED TRUSTEE for the amount, if he took with notice of the trust.

EQUITY. The facts are sufficiently stated in the opinion.

H. Webster, for the defendants.

S. H. Goodall, for the complainants.

By Court, BELL, C. J. The authorities cited by the defendant relate entirely to bills in equity brought in aid of an execution at law. Such bills may be brought in two cases: first, where a party has acquired a lien on certain real estate or personal estate, by attachment or seizure on execution, or by docketing his judgment, or delivering his execution to an officer, according to the usages of different states as to the mode of acquiring a lien on property by suit, and some conveyance or incumbrance stands in the way of his execution. In such cases, the party may file his bill to set aside the obstacle, as soon as he has acquired his lien: *Dodge v. Griswold*, 8 N. H. 245; *Kittredge v. Warren*, 14 Id. 509; *Kittredge v. Emerson*, 15 Id. 227; *Stone v. Anderson*, 26 Id. 506. The second case is where the party has obtained no lien, or the property sought to be reached is not liable to an execution at law, as in the case of choses in action, funds held in trust for the debtor, or the like. In such cases, equity will not interfere to subject the property to the discharge of the debt, until it is first shown that the party has exhausted his remedy at law, by alleging and proving that he has issued his execution against his debtor, and that the same has been returned by the proper officer unsatisfied, because no goods can be found. Both these classes of cases are discussed in *Tappan v. Evans*, 11 Id. 311, where the rules applicable to them are distinctly stated. If this is regarded as belonging to either of these classes, the bill

cannot be maintained, because here it is not pretended that any lien has been acquired by proceedings on an execution, or preliminary to an execution, or that any execution has been issued and returned unsatisfied. The bill cannot have been filed with any such view. On the contrary, it does not allege any legal proceedings except those in the probate court, which, though they may establish the fact and the amount of an indebtedness of the guardian's estate to his wards, cannot result in any execution until the end of a suit at law on the guardian's bond, or on the decree of the court. It is, undoubtedly, filed upon a different view of the relations of the parties. Executors and administrators of decedents' estates, and guardians of minors and others, are regarded in equity as trustees; the funds which come into their hands are trust funds, and in proper cases the remedies, which are open to *cestuis que trust*, are equally available to those who are entitled to the moneys which are found in the hands of such executors and guardians: *Adair v. Shaw*, 1 Sch. & Lef. 243; 1 Story's Eq. Jur., secs. 533, 581; Ram on Assets, 491, c. 37, sec. 4.

The complainants state, as their case, that J. McIntire was duly appointed their guardian; that as such he has sold a large amount of property belonging to them, and the money arising from these sales has been paid over by McIntire to the other defendant, or was originally paid by the purchasers of the property to him, by direction of McIntire; that this money was received by Hatch, with the knowledge that it was a fund derived from the sale of the complainants' property, and that it therefore legally and equitably belonged to them; that they have endeavored to obtain a settlement with McIntire during his life, and with the administratrix since his decease, by proceedings in the court of probate, which have been, and are likely to be, ineffectual, because McIntire's estate is insolvent, and the sureties upon his official bond are irresponsible. The object of the bill is to call upon the administratrix and the alleged depository of the fund, to discover the facts, and if there can be found within reach of the court any part of the fund, that the court may order it to be paid over to the complainants.

The question is, if, in this view, the bill sets up a case in which the plaintiff is entitled to relief. The remedy by proceedings at law must be entirely illusory, if we assume, as we must of course, upon a demurrer, that the allegations of the bill are true. Let us then suppose that the claim of the plain-

tiffs upon the estate of the guardian is ascertained, either by proper proceedings in the court of probate or by an agreement. The wards may then, by an order of the court of probate, sue the sureties on the guardian's bond; but they are admitted to be insolvent, and the remedy is, therefore, worthless. Or they may proceed against the insolvent estate of the guardian, by presenting their claim to the commissioner, and upon its allowance receive their dividend of the assets with the other creditors. Upon their statement, there is in the hands of the defendant Hatch a large sum of money derived from the sale of their estate, received by him with full knowledge of its origin and condition, and for which, if he should be charged in this proceeding, he will be accountable in full, unless he or the other defendant—the administratrix of the guardian—shall show that some part of it is, in equity, the property of the guardian. Hatch is alleged to be a large creditor of this insolvent estate. If this bill can be defeated, this fund will fall into the general mass of the assets, and will be distributed among all the creditors *pro rata*, Hatch sharing equally with its equitable owners in the whole fund, in proportion to the amount of their respective claims, upon the most favorable chance for the plaintiffs; as, against McIntire's estate, Hatch may, perhaps, be entitled to set off McIntire's private debt against the whole claim, and thus neither the plaintiffs nor the other creditors might be able to reach any part of it.

The claim of the plaintiffs, if well founded in fact, is one of a purely equitable character. No proceeding in the court of probate would afford them any relief, and we are unable to discover any course of proceeding at law by which they could obtain any redress; neither do we see any way by which the prosecution of any suit or proceeding in the court of probate or at law could materially aid them in this proceeding. We think there can be no doubt as to the equitable principles involved in the case. It has been truly said that the only thing inquired of in a court of equity is whether the property bound by a trust has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it. Trusts are enforced not only against persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust: 1 Story's Eq. Jur., sec. 533.

Generally speaking, a man does not become a party to a breach of trust by buying, or receiving as a pledge for money advanced to the executor at the time, any part of the assets. But he does become such party by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt. Whenever there is a misapplication of the personal assets, and they, or the proceeds of them, can be traced into the hands of any person affected with notice of such misapplication, then the trust will attach upon the property or the proceeds in the hands of such person, whatever may have been the extent of the misapplication or conversion: *Ram on Assets*, 491, c. 37, sec. 4; *Adair v. Shaw*, 1 Sch. & Lef. 261, 262; 1 Story's Eq. Jur., sec. 581; 2 Madd. Ch. Pr. 125; *Murray v. Ballou*, 1 Johns. Ch. 566; *Sheppard v. McEvers*, 4 Id. 136 [8 Am. Dec. 561]; *Murray v. Sylburn*, 2 Johns. Ch. 441; *Shibla v. Ely*, 6 N. J. Eq. 181; *Oliver v. Piatt*, 3 How. 333.

Courts of equity act by creating trusts *in invitum*, where a party purchases trust property, knowing it to be such, in violation of the objects of the trust. In such a case, courts of equity force the trust upon the conscience of the guilty party, and compel him to perform it, and to hold the property subject to it in the same manner as the trustee himself held it: 4 Kent's Com. 60; 2 Fonbl. Eq., b. 2, c. 6, sec. 1 (a), 2 (b); *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 347; Com. Dig., tit. Chancery, 4, W, 28.

It is upon this ground that persons colluding with the executor or administrator, in a known misapplication of the property in their hands, are made responsible, for they are treated as purchasers with notice, and mere trustees of the parties who are entitled to the assets; the latter being a trust fund under the administration of the executor or administrator: *Adair v. Shaw*, 1 Sch. & Lef. 262; *Leigh v. Macaulay*, 1 You. & Coll. 265; 1 Story's Eq. Jur., sec. 1255.

Upon these views, the demurrer must be overruled.

Demurrer overruled.

PURCHASER FROM TRUSTEE, WITH KNOWLEDGE OF TRUST, TAKES SUBJECT TO TRUST: *Smith v. Daniel*, 16 Am. Dec. 641; *Shepherd v. Van Boers*, 8 Id. 561; *McCambs v. Bee*, 16 Id. 610; *Jackson v. Matsdorf*, 6 Id. 355; *Knloch v. I'on*, 28 Id. 196; *Lagow v. Badolett*, 12 Id. 258; *Heih v. Richmond F. & P. R. R. Co.*, 50 Id. 88, and notes to these cases. The assignee of a trustee will be compelled to execute the original trust at the instance of the *cestui que trust*: *Pierce v. McKeehan*, 45 Id. 635. A guardian can do nothing to prejudice his ward; and where the guardian transfers an obligation due the ward

in payment of his own debt, the purchaser, if he has notice, takes it at his peril, and the ward can charge him with the obligation. As persons acquiring property bound by trust, with notice of the trust, are considered as trustees, so infant wards may affirm or disaffirm the transfer, by their guardian, of any obligation due them, on arriving at age, and may pursue the trust fund: *Carpenter v. McBride*, 52 Id. 379, and note 384.

CITATION OF PRINCIPAL CASE.—In *French v. Currier*, 47 N. H. 88, it was held that where a guardian receives the stocks or other funds belonging to his ward, he must hold and account for the same as a trust, at the price at which he took them, and if any be disposed of, then at the highest price received by the guardian; and that he must also account for all dividends or income that may be realized from said funds. If the guardian has invested any of the moneys of his ward in unproductive stocks, it must be, as held in the case mentioned, at his own risk, as the ward is not obliged to assume them when he arrives at age. The principal case was cited to the point that trusts of this nature are enforced, not only against persons who are rightfully possessed of the trust property, but against all persons who come into possession bound by the trust, or with notice of the trust; and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust.

ROBINSON v. HOLT.

[39 NEW HAMPSHIRE, 567.]

CONVEYANCE TO DELAY, HINDER, OR DEFRAUD CREDITORS IS FRAUDULENT and void as to those creditors in New Hampshire; the statute of 29 Eliz., c. 5, having been adopted as a part of the common law of that state.

PURCHASER OR MORTGAGEE OF PROPERTY, taking with knowledge that the vendor or mortgagee intends thereby to defeat, hinder, or delay his creditors, is charged with participation in the fraud, though he may pay full consideration and take immediate and open possession. The transaction is void as to creditors.

CONFUSION AND INTERMINGLING OF GOODS.—Where a person mingled his hay with that of a judgment debtor, and did not and could not identify his own: *Held*, that the mass became the property of the judgment debtor as between the party mixing the hay and an officer levying upon the same under a writ of execution against the debtor.

DOCTRINE OF CONFUSION OF GOODS is: If the goods can be distinguished and separated, each may claim his own; if the goods are of the same nature and value, as corn, tea, etc., then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions, or through whose neglect or fault occurs, the wrongful mixture must bear the whole loss.

TROVER for five tons of hay. One Merriam mortgaged all his property to plaintiff, as the jury found, to defraud, hinder, and delay his creditors. Plaintiff knew the purpose, but paid value and took possession. Plaintiff had some old hay, which he pitched over and mixed with some new hay that he had thus come into possession of. Defendant was a deputy sheriff,

and levied certain executions on the hay and sold it as the property of Merriam. He had no knowledge that there was any old hay there, and plaintiff gave him no notice regarding it. Defendant had notice of the mortgage. Judgment for defendant, and plaintiff excepted.

Lane, for the plaintiff.

Wheeler and Faulkner, for the defendant.

By Court, FOWLER, J. By the statute of 13 Eliz., c. 5, made perpetual by 29 Eliz., c. 5, and adopted as part of the common law in this state, "for avoiding feigned, convinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands, tenements, and hereditaments as of goods, chattels, wares, and merchandise, which feoffments, etc., have been devised of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, etc., not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing," etc., it was declared and enacted in the second section, "that all and every feoffment, gift, grant, alienation, and conveyance, and all and every bond, suit, judgment, and execution, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken," as against such creditors and others, and their representatives, "to be utterly void and of none effect." The act contained a proviso in the sixth section, excepting from its operation transactions upon a good consideration and *bona fide*.

The finding of the jury in the present case, that it was the intention of the debtor, when he gave the plaintiff his mortgage, thereby to put his property in such a position as to defraud, hinder, or delay his creditors, and that this intention was known to the plaintiff when he took the mortgage, brings the conveyance under which the plaintiff claims to recover within the express prohibition of the statute, and excludes the plaintiff from all benefit of the proviso thereto, in accordance with repeated decisions of our own courts, since he who purchases or takes a mortgage of property with knowledge of the fraudulent design of the vendor or mortgagor, thereby to defeat, hinder, or delay his creditors, is, in law, charged with a participation in the fraud, although he may pay a full consideration, and take immediate and open possession. When the

purchaser or mortgagee makes the purchase or takes the mortgage with knowledge of such fraudulent intent on the part of the vendor or mortgagor, the transaction cannot be said to be *bona fide*, however full and valuable the consideration may be: *Twyne's Case*, 3 Co. 80, and authorities; S. C., 1 Smith's Lead. Cas. 35-80, where the principal authorities, English and American, are collected; *Coburn v. Pickering*, 3 N. H. 315 [14 Am. Dec. 375]; *Parker v. Pattee*, 4 Id. 176; *Trask v. Bowers*, Id. 309; *Smith v. Lovell*, 6 Id. 67; *Paul v. Crooker*, 8 Id. 288; *French v. Hall*, 9 Id. 137 [32 Am. Dec. 341]; *Page v. Carpenter*, 10 Id. 77; *Clark v. Morse*, Id. 236; *North v. Crowell*, 11 Id. 251; *Smith v. Smith*, Id. 459; *McConihe v. Sawyer*, 12 Id. 396; *Blake v. White*, 13 Id. 267; *Seavy v. Dearborn*, 19 Id. 351; *Blodgett v. Webster*, 24 Id. 91; *Kimball v. Thompson*, 4 Cush. 441; *Bridge v. Egglestone*, 14 Mass. 245 [7 Am. Dec. 209].

The question predicated upon the finding of the jury that the plaintiff allowed the hay mortgaged to him to be so mixed with the hay of the debtor that the defendant, upon making reasonable inquiry as he did, was unable to distinguish one from the other, is entirely superseded by holding the plaintiff's mortgage void under the finding of the jury upon the other branch of the case. Still, it seems to us entirely clear that had the plaintiff's mortgage been valid the defendant did all he was bound to do under the circumstances, and would have been justified in selling the plaintiff's hay if any such had been intermingled with the debtor's. He permitted the hay mortgaged to him by the debtor to become so mixed with the hay of the debtor that the defendant, after making every reasonable inquiry and effort, was unable to distinguish what was the debtor's and what had been mortgaged to the plaintiff. The plaintiff gave no notice of his claim, and did not offer to identify or point out any portion of the hay as his own. The intermingling was by the fault or neglect of the plaintiff in the first instance, and so intimate that upon diligent inquiry the defendant could not distinguish the hay of the plaintiff from that of the debtor. The plaintiff neglected to identify his property, and omitted even to give notice of any claim. A portion of the hay belonged to the debtor, and this the defendant had a right to attach and sell upon the writ and execution against him. With this hay the plaintiff had negligently and carelessly permitted his hay to become so intermingled as to be undistinguishable from it. On general principles, therefore, the mass of hay became the property of the debtor, as

between the plaintiff and an officer attaching the same upon a writ and execution against that debtor.

The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other article of the same kind and quality, then each may claim his aliquot part; but if the mixture is undistinguishable, because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each; or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs, the wrongful mixture must bear the whole loss: *Lupton v. White*, 15 Ves. 432; 2 Bla. Com. 405; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; S. C., Id. 513; 1 Story's Eq. Jur., secs. 468, 623; Story on Agency, secs. 205, 333; 2 Kent's Com. 364, 365; Story on Bailments, sec. 40; *Bond v. Ward*, 7 Mass. 123 [5 Am. Dec. 28]; *Shumway v. Rutter*, 8 Pick. 443 [19 Am. Dec. 340]; Dane Abr., c. 76, art. 3, sec. 15; *Armory v. Delamirie*, 1 Stra. 505; *Panton v. Panton*, cited 15 Ves. 440; *White v. Lady Lincoln*, 8 Id. 363; *Chedworth v. Edwards*, Id. 46; *Newman v. Payne*, 2 Ves. jun. 203; *Ryder v. Hathaway*, 21 Pick. 298; *Lewis v. Whittemore*, 5 N. H. 364 [22 Am. Dec. 466]; *Seavy v. Dearborn*, 19 Id. 351; *Walcott v. Keith*, 22 Id. 196; *Wilson v. Lane*, 33 Id. 446; *Gilman v. Hill*, 36 Id. 311.

As the plaintiff's mortgage was void from its inception as against the creditor for whom the defendant acted, and, if it had not been, the plaintiff's hay was so intermingled with that of the debtor as to be undistinguishable from it, the exceptions taken to the verdict in the court below must be overruled, and the judgment rendered upon it affirmed.

Exceptions overruled.

EFFECT OF GRANTEE'S PARTICIPATION IN CONVEYANCE, made for the purpose of hindering, delaying, or defrauding creditors, is generally to vitiate the sale: *Peck v. Land*, 46 Am. Dec. 368; *Hutchinson v. Horn*, 50 Id. 470; *Carlton v. King*, 23 Id. 295; *Hempstead v. Johnston*, 65 Id. 458; *Smith v. Grim*, 67 Id. 400; *Ladd v. Wiggin*, 69 Id. 551; *Mills v. Howeth*, 70 Id. 331. But a

creditor may purchase *bona fide* of his debtor, though he know the object of the latter in making the sale is to defeat other creditors: *Worland v. Kimberlin*, 44 Id. 785; and a *bona fide* purchaser without notice of any fraudulent design will be protected under the statute of frauds: See note to *Hutchinson v. Horn*, 50 Id. 473. But a full consideration for a fraudulent conveyance will not render a deed valid unless accompanied by good faith on the part of the vendee: *Lowry v. Pinson*, 23 Id. 140; *Rogers v. Evans*, 56 Id. 537, and note 540; *Mills v. Howeth*, 70 Id. 331; *Wood v. Chambers*, Id. 382. But where the vendee pays a full and fair price, a considerable portion of which is actually applied to the payment of debts of the vendor, for which the vendee was surety, this fact furnished a strong presumption of the good faith of the vendee in the purchase, and ought to be left to the jury: *Brown v. Force*, 46 Id. 519.

ACCESSION—CONFUSION OF GOODS DEFINED, ETC., WITH EFFECT ON TITLE: *Cross v. Marston*, 44 Am. Dec. 353; *Willard v. Rice*, 45 Id. 226, and note 227; *Hesseltine v. Stockwell*, 50 Id. 627, and note 630; *Inglebright v. Hammond*, 53 Id. 430, and notes 435. See, particularly, the extended note to *Pulcifer v. Page*, 54 Id. 589, 590, discussing the matter at length. The above cases illustrate various propositions in the *syllabus*, *supra*.

THE PRINCIPAL CASE WAS CITED in *True v. Congdon*, 44 N. H. 55, to the point that an assignment entered into with intent to hinder, delay, or defraud creditors will be void as to such creditors. And that it will also be void if such object be known to the assignee at the time of such assignment.

CHAPIN v. SULLIVAN RAILROAD.

[39 NEW HAMPSHIRE, 564.]

RAILROAD COMPANIES MUST CONSTRUCT AND MAINTAIN CATTLE-GUARDS at farm-crossings, and are liable for injuries to stock rightfully at such crossings, but occasioned in consequence of the companies' neglect to maintain such guards.

RAILROAD COMPANIES ARE NOT LIABLE FOR INJURIES TO CATTLE WRONGFULLY running at large, and getting upon their track, even though they have no fence against such stock.

RIGHT OF RAILROAD COMPANY IN ITS ROAD-BED, under an arrangement whereby they have the right to construct and use a track, and hold the same for railroad purposes, amounts only to a permissive license, and gives no right to the soil. Any stone, therefore, excavated in grading the track, and not actually used in the construction of the track, belongs to the owner of the land, and cannot be removed without his permission.

RAILROAD COMPANY MAY USE STONE AND GRAVEL FROM ONE PORTION OF THEIR LINE in the proper construction of any other portion thereof, even though they do not own the land, but only have a permissive license to use it for railroad purposes.

TRESPASS. Defendants' track ran through plaintiff's land. A crossing was made for plaintiff, but no cattle-guard put in to prevent stock from running up or down the track while being driven across. Plaintiff's sheep, in being driven across, ran up the track, and were injured by defendants' engine. An

ox of plaintiff's running on the highway escaped to the track, in consequence of there being no cattle-guards, and was also struck by the engine and killed. Plaintiff had given defendant the right to use certain parts of his land for the construction of a branch road, and to use and hold the same for railroad purposes. Considerable rock was found, part of which defendants removed and used on the main line of their road. The stone was valued at seventy-three dollars, the ox at forty, and the sheep at twenty-five dollars.

Stoughton and Grant, for the plaintiff.

E. L. Cushing, for the defendants.

By Court, FOWLER, J. By the fifth section of chapter 593 of the laws of 1850 (Comp. Laws, 350), it is made the duty of every railroad corporation in this state to make and maintain all necessary cattle-guards, cattle-passes, and farm-crossings for the convenience and safety of the land-owners along the line of their road.

The report of the commissioner finds distinctly that the injury to the plaintiff's sheep was caused by the want of cattle-guards at the farm-crossing, prepared by the defendants for the use of the plaintiff, with the plaintiff's assent to its location, and not through any fault of the plaintiff. The defendants were bound to construct and maintain at the crossing thus prepared by them the guards necessary to prevent the plaintiff's sheep, when driven over it, from passing on to their track. In consequence of their neglect to do so, the plaintiff was damnified to the amount of twenty-five dollars by the destruction of his sheep, and for this damage he is clearly entitled to recover: *White v. Concord Railroad*, 30 N. H. 188; *Chapin v. Sullivan Railroad*, 39 Id. 53 [*ante*, p. 207].

Our conclusion upon this point in no way conflicts with the decision in *Horne v. Atlantic and St. Lawrence Railroad*, 36 N. H. 444, cited by the defendants. It was there held that a land-owner had no right of action against a railroad for damages resulting from the want of farm-crossings and cattle-passes, unless the railroad had agreed to provide them, or the land-owner had applied to justices, under the statute, to have them located and constructed. In the case before us, it is fairly to be inferred that the parties had agreed upon the number and place of the crossings, and the railroad company had undertaken to construct them, but had constructed the one near which the injury to the plaintiff's sheep happened so

improperly that the injury occurred in consequence of the deficiency. The defendants, then, had performed an admitted and recognized duty they owed the plaintiff, so imperfectly and negligently that in consequence of their misconduct the plaintiff suffered the injury of which he complains. Nothing seems plainer than that for an injury thus resulting directly and immediately from the palpable fault of the defendants, the plaintiff ought to recover full compensation.

The plaintiff's ox was wrongfully running at large in the highway. Against an animal thus wrongfully upon the highway, the defendants were bound to maintain neither fences nor cattle-guards. When it escaped from the highway upon the defendants' track, it was wrongfully there, and having been killed by the defendants' engine, without negligence on the part of themselves, their agents, and servants, the defendants are not responsible for the loss: *Woolson v. Northern Railroad*, 19 N. H. 267; *Chapin v. Sullivan Railroad*, 39 Id. 53 [*ante*, p. 207].

The defendants entered upon the plaintiff's land under an arrangement whereby they had a right to construct and use the track for their branch road thereon, and hold the same as long as it should be used for railroad purposes. This arrangement, as stated by the commissioner, we think amounted only to a permissive license, and gave the defendants no right to the soil, or the stone contained therein, for any other purpose than the construction and use of their track. They might, undoubtedly, have used the stone excavated on the plaintiff's land in grading this branch track, for the construction of the necessary culverts and bridges therein; but the material for those purposes having been procured elsewhere, a mere license to construct and use the track, and hold the land, could give the defendants no right to appropriate this stone to a similar use elsewhere. Upon the report of the commissioner, it must be held that the stone excavated from the plaintiff's land in grading the branch track, so far as not actually used in the construction of that track, belonged to the plaintiff, and could not be removed by the defendants without his permission.

The natural and respective rights and duties of railroad corporations and land-owners, in respect to lands appropriated by authority of law to railroad purposes, were discussed and considered in *Blake v. Rich*, 34 N. H. 282, where, upon a full examination of the statute and authorities, it was held that the exclusive right of property in the land, in the trees and herb-

age upon its surface, and the minerals beneath it, remains unchanged, notwithstanding the location of a railroad thereon, subject always to the right of the corporation to construct and operate a railroad over and through it, as authorized by law. There is perhaps nothing in the report of the commissioner demanding any expression of our opinion as to what might or might not have been the rights and liabilities of the parties in the present case, in respect to stone, earth, and gravel excavated in grading the branch track across the plaintiff's land, had that track been a portion of the road as originally laid out, and had the land for the construction of the entire line been taken and appropriated to railroad purposes by the appraisal of the railroad commissioners and the selectmen of the town, under the provisions of the statute. It may not, however, be improper to state our decided impression that, in such case, the railroad might and would have been entitled to employ the whole or any portion of the earth, stone, and gravel excavated on one portion of the line in the proper construction of any other portion thereof.

As, upon the findings of the commissioner, the plaintiff remained the owner of the land, and whatever stone and other materials excavated therefrom were not used and appropriated by the defendants in pursuance of their license, he is entitled to recover the value of all the stone taken by the defendants and removed to their original track, whether the same had been deposited at the time of excavation within or without the limits of the branch road as located.

The plaintiff is then entitled to judgment upon the commissioner's report for the sum of ninety-eight dollars, being the amount of damage to his sheep, and the value of the stone removed, as fixed by the commissioner, with interest from the date of the writ.

Judgment for the plaintiff.

DUTY OF RAILROAD COMPANY TO CONSTRUCT FENCES AND MAINTAIN CATTLE-GUARDS ALONG ITS LINE: See cases collected in note to *Chapin v. Sullivan R. R.*, ante, p. 212.

LIABILITY OF RAILROAD COMPANY FOR INJURING CATTLE TRESPASSING UPON THEIR TRACK: See cases collected in *Chapin v. Sullivan R. R.*, ante, p. 212. As to injuries to cattle where no fence is required, see note to *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 261-266; *Louisville R. R. Co. v. Milton*, 58 Id. 647; *Perkins v. Eastern R. R. Co.*, 50 Id. 589; *New York and Erie R. R. Co. v. Skinner*, 57 Id. 654; *Vandegrift v. Rediker*, 51 Id. 262; *Danner v. South Carolina R. R. Co.*, 55 Id. 678; *Gorman v. Pacific R. R.*, 72 Id. 220; *Lawrence v. Combs*, Id. 332.

COOK v. COMBS.

[29 NEW HAMPSHIRE, 592.]

PAROL EVIDENCE OF WARRANTY OF QUANTITY OF LAND CONVEYED BY DEED IS INADMISSIBLE, as tending to vary the terms of the instrument.

ASSUMPSIT. Plaintiff purchased of defendant an undivided half of what defendant said was seventy-seven acres of land, and paid seven dollars and fifty cents per acre. There proved to be in fact only forty-five acres. Plaintiff then brought *assumpsit* to recover the difference between what he did pay and what he should have paid at the rate per acre named. The other facts are sufficiently stated in the opinion.

Wheeler and Faulkner, for the defendant.

Lane, for the plaintiff.

By Court, DOX, J. The plaintiff intended to pay the defendant the amount which he did pay, and no part of it can be recovered as paid by mistake. There is no failure of consideration, for the plaintiff has received all that the deed purported to convey. He has not reconveyed the land to the defendant, or tendered or offered to tender him a deed of it, and he cannot recover on the ground of rescission of contract. The evidence objected to tended to prove a parol warranty of the quantity of land made before the delivery of the deed, and not incorporated in it. This evidence was inadmissible. It would vary the deed as much as parol evidence of a warranty of title would vary a deed containing no warranty. It must be taken that the plaintiff received the deed as the evidence of the entire contract reduced to writing. It does not appear that the warranty of quantity was omitted in the deed by the fraud of the defendant, or the mistake of the writer, or that the plaintiff was unaware of the omission, or that he made any objection to the deed. If it had been understood that a warranty of quantity was included in the contract of sale, it cannot be supposed that the plaintiff would have consented to the omission of so important a part of the contract when it was put in writing, relying upon parol evidence to protect himself and his heirs against the only breach of the contract which he would probably have had any reason to fear. *Powell v. Edmunds*, 12 East, 6, is a case quite similar to this.

Verdict set aside.

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PAROL EVIDENCE AS TO QUANTITY OF LAND CONVEYED: *Cock v. Taylor*, 5 Am. Dec. 650; *Kerr v. Calvit*, 12 Id. 537, and cases cited in note thereto 541. Where a deed was executed and delivered, conveying a certain number of acres of land, it was held that no parol evidence was admissible to show a mistake in the quantity mentioned in the deed; and that no action could be maintained for money had and received, to recover the money paid for the number of acres alleged to be deficient: *Howes v. Barker*, 3 Id. 526. As to the general rule excluding parol testimony to alter or vary the terms of a written contract, with the exceptions and limitations thereto, see *Woollen's Ex'rs v. Hillen's Ex'r*, 52 Id. 690; *Melton v. Watkins*, 60 Id. 481; *Irwin v. Ivora*, 63 Id. 420; *Cannon v. Folsom*, Id. 474; *Summerlin v. Hesterly*, 65 Id. 639; *Bowen v. Slaughter*, 71 Id. 135; *Walker v. Wells*, Id. 164; *Pribble v. Kent*, Id. 227, and the cases collected in the notes to the same.

CASES

IN THE

SUPREME COURT OF ERRORS AND APPEALS

OF

NEW JERSEY.

BAKER v. BAKER.

[4 DUTCHER, 12.]

RULE FOR COMPUTING INTEREST WHEN PARTIAL PAYMENTS HAVE BEEN MADE.—Cast the interest on the principal to the time of the first payment, and if the payment equal or is greater than the interest, deduct the payment. If the payment does not equal the interest, it is not to be credited until, with the future payments, the interest is equaled or exceeded.

IF ERRONEOUS RULE FOR CALCULATING INTEREST is adopted with the knowledge and sanction of the parties, though adopted ignorantly, it is a mistake of law. If an erroneous calculation is adopted, it is a mistake of fact.

WHERE DEBTOR GIVES HIS BOND for the amount reached by the adoption of an erroneous rule for computing interest, and the creditor, with knowledge of the rule adopted, accepts the bond as payment of the debt, and collects the money secured by it, although the whole debt may not be included in the bond, it becomes thereby merged therein, and extinguished by operation of law. Such extinguishment is, at law, complete, final, and conclusive.

TAKING HIGHER SECURITY FOR DEBT extinguishes those of inferior degree for the same debt.

RECOVERY OF PART OF ENTIRE DEBT, in an action at law, will bar the recovery of the residue; nor can it be shown in a subsequent action that there has been a mistake in the calculation of interest. That part of it has thus been left out of the judgment.

PRINCIPLE OF EXTINGUISHMENT APPLIES AS WELL TO CASES of judgment by mistake for part of the debt, as to that of a bond accepted by mistake for the whole debt. Both extinguish the whole debt.

RELEASE IN DISCHARGE OF DEBT by act of the party. Extinguishment is a discharge by operation of law.

THE opinion states the facts.

Hageman, for the plaintiff.

G. H. Brown, for the defendant.

By Court, WHELPLEY, J. On the first day of April, 1836, the defendant was indebted to the plaintiff in the sum of one thousand seven hundred and fifty dollars for lands sold and conveyed by the plaintiff to defendant.

In March, 1852, a settlement and adjustment of the amount due was made by William Lytle and Dr. Ferdinand S. Schenck, chosen by the parties for the purpose. Various payments had been made upon the one thousand seven hundred and fifty dollars at different times, between the first of April, 1836, and March, 1852. These gentlemen were called, not to arbitrate, but to calculate the true amount due after allowing the payments by the correct mode of computation. They mistook the rule; calculated the interest on the whole sum for the whole time; added to it the principal; calculated the interest on the payments from the time they were made; added that to the sum of the payments, and subtracted that amount from the amount of the principal and interest first found. The balance was one thousand two hundred and thirty-four dollars and ninety-four cents. For this amount Baker, the defendant, gave his bond, which he afterwards paid. The plaintiff's action is brought to recover the difference between this and the true amount due.

The correct mode of calculation was stated to the jury by the judge at the trial. They were instructed to cast the interest on the principal to the time of the first payment, and if the payment equaled or was greater than the interest, to deduct the payment; if the payment did not equal the interest, it was not to be credited until, with the future payments, the interest was equaled or exceeded: *Meredith v. Banks*, 6 N. J. L. 408.

The intention of the computants was to ascertain the correct balance by the true rule; they mistook it, and the result was erroneous. The court instructed the jury that if the amount was found by mistake incorrectly, it could be corrected, and they might render a verdict for the balance not included in the bond. They found for the plaintiff three hundred and seventy-three dollars.

The plaintiff now insists that the real mistake was seven

hundred and fifty dollars; the defendant, that it was three hundred and forty dollars.

The defendant insists that the verdict should be set aside for three reasons: 1. Because the mistake was of law, not of fact, and is such as cannot be corrected; 2. That the plaintiff's claim became merged in the bond; 3. That certain exceptions filed by the defendant in the orphans' court were improperly admitted in evidence.

It is admitted that the plaintiff did not intend at the time of settlement to give up any part of the debt; nor did the defendant suppose he was not settling the whole amount due by him when he gave his bond for the assumed amount. Is there no relief in a case of this kind? The evidence shows that the mode of computation was a disputed question between the parties, and that the witnesses, Dr. Schenck and Mr. Lytle, were called on to settle that question; that both modes were considered by them, and the erroneous mode deliberately adopted with the knowledge and sanction of the parties. They were ignorant of the proper arithmetical rule by which to determine the amount due; the principal was known, the payments were known; there were no circumstances of fraud, surprise, or imbecility of either of the parties to modify or in any way distinguish the case from that of a simple mistake. What was the character of that mistake? Was it one of fact or of law, or of a mixed character, partly of law and partly of fact?

The parties, at the time of the settlement, were ignorant of no pure fact involved in the settlement; they knew the rule adopted to find the balance. They did not know that rule to be erroneous; and, as a consequence, the result reached by its application to be erroneous also. The wrong mode was adopted ignorantly. The proper mode of applying payments to the liquidation of a debt drawing interest has always been treated by the courts as a question of law, to be controlled by the court. That it is the duty of juries to apply the rule laid down by the court to the facts of each case has never been doubted. The court declares the rule, the jury apply it. The mistake made by the parties in this case was in the mode of applying the payments—in the rule of calculation, not in the calculation itself—the application of the rule; the latter would be a mistake of fact, the former of the law.

This was so held by the supreme court of New York in the case of *Boyer v. Pack*, 2 Denio, 107, which was an action to

recover back an over-payment. In that case, the parties did not know that an erroneous rule of calculation had been adopted. The court held it an error in fact, because they did not know that the rule had been adopted; but said that if they had, there could have been no relief, as it then would have been an error in law. To the same effect are the following cases: *New York Fireman's Ins. Co. v. Ely*, 2 Cow. 678 [13 Am. Dec. 100]; *Maine Bank v. Butts*, 9 Mass. 55; *Sussex Bank v. Baldwin*, 17 N. J. L. 487.

The mistake in this case was occasioned by sheer ignorance of an arbitrary rule adopted by the courts to prevent compounding interest. No satisfactory reason can be assigned why the creditor should not have interest upon the interest expressly reserved, and payable by the term of his contract, after it becomes due, except that it compounds so rapidly as to become oppressive in fact. In all cases of breach of contracts, except that of paying interest, compensation to the creditor is the measure of damages; in this, the debtor is suffered to reap a benefit by his own breach of contract. If he delay the payment of one thousand dollars interest money one year, he is the gainer by sixty dollars, and the creditor a loser to that amount. The rule which prohibits a contract in advance, that unpaid interest shall be converted into principal, but recognizes the validity of a contract, if made after it becomes due, to pay interest upon it, and the rule which permits a party to include the interest as principal in the installment, and gives interest on the whole installment as damages, are like the one now under consideration, arbitrary rules of law adopted from mixed considerations of law, policy, and convenience. I have made these remarks, not for the purpose of impugning the wisdom of these rules, or disturbing their authority, but to show that the whole law upon the subject of compound interest does not rest upon the statute alone, but has its support upon other grounds. There is no such rule as that compound interest under all circumstances is illegal and cannot be taken. The law prescribes under what circumstances it may be taken, and in this case of the application of payments, now before the court, that it cannot be taken.

The defendant gave his bond for the amount reached by the adoption of the erroneous rule. The plaintiffs, with full knowledge of the rule adopted, accepted the bond as payment of the debt, and afterwards deliberately collected the money secured by it.

The defendant now admits that the whole debt was not included in the bond, but insists that the bond was taken in satisfaction of the debt, and that thereby the whole debt was merged in the bond, and extinguished by operation of law; that the extinguishment was complete, final, and, in a court of law at least, conclusive.

The doctrine of extinguishment, as applied to cases of this description, is that a security of a higher nature extinguishes those of an inferior degree for the same debt. A bond extinguishes a simple contract debt; a judgment extinguishes a debt due by simple contract or by deed: *Higgins' Case*, 6 Co. 44 b; 4 Bac. Abr., Bouv. ed., 149; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 302; *Mills v. Starr*, 2 Bailey, 359; *Butler v. Miller*, 1 Denio, 407; *Andrews v. Smith*, 9 Wend. 53.

In *United States v. Lyman*, 1 Mason, 482, Story, J., says: "I admit the doctrine, that, in general, a higher security, taken from the debtor himself, extinguishes the original contract; but this proceeds upon a presumption of law that it is taken in satisfaction of the original debt, for if it appear otherwise upon the face of the security, it will not operate as an extinguishment."

It is, therefore, after all, a mere question of intent; and the law, in the absence of other evidence of the intent, construes the higher security of the debtor himself as an extinguishment, because it gives a higher remedy. This appears to be the true rule, although there is a little conflict of authority upon the question whether a higher security between the same parties for the same debt be not an extinguishment *per se*.

The higher security must be between the same parties and for the same debt: *Bell v. Banks*, 3 Man. & G. 258; notes to *Cumber v. Wane*, 1 Stra. 426; S. C., 1 Smith's Lead. Cas. *357.

Both plaintiff and defendant thought this bond to be for the whole amount due; it had been agreed upon by them as such.

The transaction does not admit of being explained as a taking of collateral security; the bond was intended as a final settlement of the claim—it was to be the sole security for the whole debt. The defendant was absolutely concluded by the settlement. If, by an erroneous calculation or mode of calculation, the bond had been for three hundred dollars too much, he could not at law successfully have resisted a recovery of its whole amount. The bond conclusively imported a good con-

sideration for the whole amount mentioned in the condition. In *Rogers v. Colt*, 21 N. J. L. 18, Carpenter, justice, says the solemnity of the instrument implies a consideration, and the defendant is estopped from averring a want of it; and in *Stryker v. Vanderbilt*, 25 Id. 482, the chief justice of this court remarked that "where the contract is in itself legal, the amount or value of the consideration cannot be inquired into in a court of law." That such is the law does not admit of a doubt. If, then, the defendant was estopped by the bond from denying in a court of law the validity of the bond, or discharging it by payment of a less sum than that named in the condition, it was because the security was of a higher nature than the original claim, and had been by him voluntarily executed and delivered in satisfaction of the whole debt, and not as collateral security for it or any part of it. The debt was entire—it was one item—it was the price of the land sold. There was no division, or intention to divide it. A recovery of part of it in an action at law would have barred the recovery of the residue; it could not be shown in a subsequent action that there had been a mistake in the calculation, that a part of it had thus been left out of the judgment: *Miller v. Covert*, 1 Wend. 487; *Guernsey v. Carver*, 8 Id. 487. The principle of extinguishment applies as well to cases of judgment by mistake for part of a debt as to that of a bond accepted by mistake for the whole debt—both extinguish the whole debt.

The estoppel of the bond, and the extinguishment of the entire debt by its acceptance as such, are correlative doctrines. Upon such a settlement, both creditor and debtor are concluded. The estoppel protects the creditor; the extinguishment, the debtor. As to neither can the settlement be disturbed in a court of law.

It is no answer to a plea of release that the parties supposed the debt had been paid when it had not, and therefore executed the release. Mistake is no reason for disputing the release; by it the parties are estopped—intention has passed into fact; it is done; it is settled—that is the import of seal. It is no answer to a plea of extinguishment that the parties never would have intended to extinguish the debt had they not been mistaken. They did so intend; the extinguishment took place upon the actual intent, though that was induced by mistake. A man commits a homicide to revenge a wrong supposed to exist; it turns out that no such wrong was ever committed, yet no one doubts that he had the intent to kill,

nor that the murder was complete, though the existing cause of the intent was a mere mistake.

It seems exceedingly clear that both the parties to the bond actually intended to merge the whole debt. They knew no other debt than that, the amount of which they fixed.

Whether they would have so done, had they understood what the true rule of calculation was, is not the question. But what did they intend?

The defendant never delivered the bond understanding that the plaintiff might sue him upon the original claim, nor did he so agree.

If the parties had the intention to merge the debt in the bond, it was merged because the parties were the same—the debt the same; it was an undivided claim entire in its foundation, form, and whole character; it was but one item. The intent to merge a part, at least, cannot be doubted, and neither the debt nor the intent was ever divided. A release is a discharge of a debt by act of the party; an extinguishment is a discharge by operation of law.

The plaintiff's debt, although never in fact paid in full, was discharged by operation of law. The settlement made was, at law, absolutely conclusive upon both; neither could show mistake as to the other.

I regret to be compelled to this conclusion. I started upon this examination not expecting to end here; my steps have been reluctant.

The justice of the case is with the plaintiffs; their claim has never been paid, but the obstacles in the way of the action are insurmountable.

It seemed to me, on first view, that the action might be sustained upon the ground that the bond was a partial payment—was not in fact for the whole of the same debt; but, upon further reflection, I am entirely satisfied that whether the claim was or not entirely merged was not a matter to be settled by calculation—by arithmetic—but by the intention of the parties. I cannot bring my mind to doubt that the parties fixed the amount of the debt, included that amount in the bond, and intended that to be the only security for the debt, the only claim by plaintiff upon defendant growing out of the transaction.

I have no means of ascertaining whether the verdict was for the correct amount, and have not examined that point.

The verdict must be set aside.

RULE FOR CASTING INTEREST when partial payments have been made: *Hart v. Dorman*, 50 Am. Dec. 285, and note 287, giving the rule in various states: See also *Hunter v. Doolittle*, 54 Id. 489; *Riney v. Hill*, 55 Id. 119.

BOND TAKEN FOR SIMPLE CONTRACT DEBT merges and extinguishes the debt: *McNaughten v. Partridge*, 38 Am. Dec. 731, and note 735.

SECURITIES OF HIGHER NATURE extinguish inferior securities: *Ladd v. Wiggin*, 69 Am. Dec. 551, and note 559, collecting prior cases: *McDonald v. Ingraham*, 64 Id. 166.

RECOVERY FOR PART OF ENTIRE DEMAND merges the whole, and bars any further recovery thereof: *Bendernagle v. Cocks*, 32 Am. Dec. 448; *Oliver v. Holt*, 46 Id. 228, and notes to these cases; *Veghte v. Hoagland*, 29 N. J. L. 133, citing the principal case to this point. See also notes to *Clark v. Rowling*, 53 Am. Dec. 300; *Moale v. Hollins*, 33 Id. 686; and *Beach v. Crain*, 49 Id. 374.

STATE v. SOUTH.

[4 DUTCHER, 28.]

LARCENY IS FELONIOUS, WRONGFUL, AND FRAUDULENT TAKING AND CARRYING AWAY by any person of the personal goods of another, with the felonious intent to convert them to his own use and make them his property without the consent of the owner.

TO CONSTITUTE LARCENY, there must be an intent on the part of the taker to wholly and permanently deprive the owner of his property.

MERE TAKING OF PROPERTY FOR TEMPORARY PURPOSE only does not amount to larceny.

LARCENY—QUESTION OF INTENT ON PART OF TAKER, whether to deprive the owner of his property permanently or temporarily, is one of fact for the jury to determine.

THE opinion states the facts.

Grandin, for the state.

Kingman, for the defendant.

By Court, GREEN, C. J. From the case stated, it must be assumed that the jury were instructed that although they should believe that the defendant, at the time he took the property, intended to return it, and did return it in pursuance of such intention, he was nevertheless guilty of larceny.

The question of intention was not left to the jury. This instruction, it is understood, was designedly given for the purpose of presenting for the consideration of this court the question whether the fraudulently depriving the owner of the temporary use of a chattel can constitute larceny at the common law; whether the felonious intent or *animus furandi* may consist with an intention to return the chattel to the owner.

Larceny is defined to be "the wrongful or fraudulent taking

and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his, the taker's, own use, and make them his property without the consent of the owner." This definition is cited and approved in 3 Ch. Crim. L. 679; 2 East P. C., c. 16, sec. 2; Roscoe's Crim. Ev. 467; 2 Russell on Crimes, 4th ed., 93; 3 Greenl. Ev., sec. 150.

Archbold defines larceny thus: "When a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them and to appropriate or convert them to his own use:" Archb. Crim. L. 119.

In the case of *Queen v. Holloway*, 2 Car. & Kir. 946, Parke, B., said: "The definitions of larceny are none of them complete. Mr. East's is the most so. But this is defective in not stating what the meaning of 'felonious,' in the definition, is. It may be explained to mean that there is no color of right or excuse for the act, and the 'intent' must be to deprive the owner, not temporarily, but permanently, of his property."

In the case last cited, it was decided that an intention to deprive the owner wholly of his property was an essential element of larceny. All the cases, says Parke, B., show that if the intention were not to take the entire dominion over the property, there is no larceny. And Coltman, J., states, as the result of all the cases, that a taking, though wrongful, for a mere temporary purpose, does not amount to larceny: See the case of *Queen v. Holloway*, reported in 1 Den. C. C. 370. The same doctrine is sanctioned in *Rex v. Phillips*, 2 East P. C., c. 16, sec. 98; *Rex v. Webb*, 1 Moo. C. C. 431; *Rex v. Crump*, 1 Car. & P. 658; *McDaniel v. State*, 8 Smed. & M. 401 [47 Am. Dec. 93]; *Witt v. State*, 9 Mo. 671.

The taking and carrying away are felonious, according to the definition of the criminal-law commissioners, where the goods are taken against the will of the owner, and where the taker intends fraudulently to deprive the owner of his entire interest in the property against his will: Cited in Roscoe's Crim. Ev. 409. A very clear and satisfactory statement of the law upon this point will be found in a well-considered note by Judge Sharswood to the case of *Queen v. Holloway*, 1 Den. C. C. 176. He states the law thus: "It seems to be settled law that every wrongful taking, without any color of right, with intent to deprive the owner wholly of his property, is larceny, whatever other motive may also have influenced the taker; and that no

wrongful taking will amount to larceny which is not done with such intent. The question for the jury in each case will be whether the facts prove such intent.

"If it appear that the prisoner kept the goods as his own till his apprehension, or that he gave them away, or sold or exchanged or destroyed them, such intent may, generally speaking, be deemed proved. . . . If, on the other hand, the prisoner took the goods with a view only to a temporary user, intending to keep them for a short time only, and to return them to the owner unimpaired, an intent thereby wholly to deprive the owner cannot, generally speaking, be deemed proved. . . . But if he took them with a view only to a temporary user, intending, however, to keep them for a very unreasonable time, or to use them in a reckless, wanton, or injurious manner, and then to leave it to mere chance whether the owner ever recovered them or no, and if he recovered them at all, would probably recover them in a damaged or altered condition, such a taking would seem, in common sense, to be ample evidence of an intent wholly to deprive the owner of his property."

The fact of the taking being merely for temporary use seems, therefore, not of itself to be inconsistent with an intent wholly to deprive the owner of his property, and therefore does not seem necessarily to negative the felony, but simply to be a piece of evidence which the jury may regard as showing a taking from wantonness, mistake, accident, frolic, or thievish design, according to circumstances.

The definition of larceny cited from the text-books, and all the adjudicated cases cited, are comparatively modern. The early authorities furnish but little light on the subject. Neither Hale nor Hawkins define the crime of larceny.

Coke's definition, that "larceny, by the common law, is the felonious or fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, neither from the person nor by night, from the house of the owner," 3 Inst. 107, cap. 47, leaves the question what constitutes the felonious taking entirely open: 1 Hale P. C. 504. The cases mentioned by Hale (1 Hale P. C. 509), and by Blackstone (4 Bla. Com. 232), of the temporary use and return of chattels, seem rather illustrations of the means by which the felonious intent may be disproved, than any statement of the principle that a temporary appropriation of property may not be felonious.

In the case of *Queen v. Holloway*, 2 Car. & Kir. 946, Lowndes,

counsel, stated in argument that it had never been expressly decided that an intent to deprive the owner permanently of his property was necessary to constitute larceny. Independent of the authorities, it seems difficult to assign a satisfactory reason why the fraudulent taking of property from the owner, and an intention on the part of the taker to use the thing taken as his own, and so wrongfully to assert an entire dominion over the thing for a time, should not constitute larceny, or why such act does not manifest a felonious intent on the part of the taker, as clearly as when he intends to deprive the owner of his property forever. But the law is well settled otherwise. It has been uniformly understood and acted upon in this state. The instruction to the jury was erroneous. The question of intent should have been submitted to the jury under instruction from the court.

The oyer should be advised that the verdict should be set aside, and a new trial granted.

LARCENY, WHAT CONSTITUTES: *McDaniel v. State*, 47 Am. Dec. 93; *State v. Seagler*, 42 Id. 404; note to *State v. Holmes*, 57 Id. 271; *Connor v. State*, 71 Id. 184.

FELONIOUS INTENT AT TIME OF TAKING is essential to larceny: *Dignowitty v. State*, 67 Am. Dec. 670, and note collecting prior cases 675; *Connor v. State*, 71 Id. 184.

TAKING ANOTHER'S PROPERTY, to constitute larceny, must be accompanied with an intention of converting it to the taker's use: *State v. Hawkins*, 23 Am. Dec. 294.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

SUYDAM v. BARBER.

[18 NEW YORK, 468.]

JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS, obtained in an action against him alone, is a bar to an action against the others. By the recovery of such judgment, the promise or cause of action as to the party sued is merged and extinguished "by operation of law, at the instance and by the act of the creditor."

JUDGMENTS OF STATE COURTS are not entitled, under United States constitution, to any higher or other effect in sister states than that which may be claimed for them in the state where rendered, according to her statutes and procedure.

APPEAL from a judgment of the New York superior court in favor of plaintiffs in an action for money they had paid on two drafts, drawn on them by the defendants, the firm of Barber, Girty, & Doran. On the trial, the plaintiffs having read the drafts, the defendant Girty, who alone defended, admitted that they were accepted and paid by plaintiffs for the accommodation of defendants, who had never provided for them. But he showed that judgment upon them had been recovered against Barber alone, in the state of Missouri, and had been marked "satisfied" upon consideration of a compromise; which judgment he claimed was a bar to a suit against him. The plaintiffs then proved a statute of Missouri tending to prevent such a suit and judgment from operating in that state as a bar to any but the person against whom it was rendered; and claimed that the effect to be accorded to the Missouri judgment in a New York court must be restricted as it would be in Missouri,

by this statute. The judge, however, dismissed the complaint, on the ground that the Missouri judgment was a bar; and the full court sustained this, holding, in an opinion by Hoffman, J., not reported, that the courts of New York were not required by any rule of comity, or by the constitutional clause and acts of congress on the subject, to accord to the Missouri judgment, on account of local statute, any different effect from that which would be given to a domestic judgment of the same tenor. The plaintiffs appealed.

A. J. Willard, for the appellants.

James C. Carter, for the respondent.

By Court, JOHNSON, C. J. The plaintiffs were nonsuited at the trial, upon the ground that the judgment recovered in the state of Missouri against Barber, in an action there commenced against him alone, merged and extinguished the original demand of the plaintiffs against him and the other parties who are in this action joined as defendants with him.

This was the main and controlling ground of the judgment appealed from; for unless it can be upheld on this ground, it is difficult to see how the mere formal satisfaction of the judgment against Barber, which appears by the contemporaneous bond referred to in the entry as the attorney's authority to satisfy, to have been founded on no actual satisfaction or extinguishment of the debt, but only upon a conditional compromise not shown to have been carried out, can be available to these defendants.

I shall assume, for the purpose of considering the question stated, that the suit brought against Barber in Missouri was founded, not upon a separate and special promise by him to repay to the plaintiffs the money which they should advance in paying the drafts of the present defendants, but upon the promise implied by law as to him and the other defendants, from the circumstance that the plaintiffs had at their request, and without funds furnished by them, advanced money to them by paying the drafts in question.

According to the common law of this state, a judgment against one of several joint debtors, obtained in an action against him alone, is a bar to an action against the others: *Robertson v. Smith*, 18 Johns. 459 [9 Am. Dec. 227]; *Pierce v. Kearney*, 5 Hill, 82; *Olmstead v. Webster*, 8 N. Y. 413. It is held to be a bar upon the ground that, by the recovery of the judgment, the promise or cause of action as to the party sued

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has been merged and extinguished in the judgment "by operation of law, at the instance and by the act of the creditor." This is plainly founded upon the nature and force of a judgment under our law, and not upon the idea that the creditor is deprived of his right for any other reason than that by the first suit and judgment he has placed himself in a position where he is unable, legally, to assert or enforce his demand. We can easily conceive that the legislature might alter this rule, and enact that a judgment against one of several debtors should have no such effect. Such a law would be a mere modification of the remedy afforded by our own legal process, and would be within the legislative authority of the state. These observations are made as showing that the consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them, and that they are not re-examinable on the merits of the controversy determined by them.

In all these particulars, the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by that government, just as it is the subject of positive regulation by what process and what courts judgments shall be rendered at all.

The case of *Besley v. Palmer*, 1 Hill (N. Y.), 482, is not at all in conflict with these views. In that case a judgment had been recovered in Indiana against L. P. Sanger, in a suit on a note against him and two others, in which he alone had been arrested, and the supreme court held that the judgment extinguished the simple contract debt as to him. Judge Cowen proceeds: "We are told this is the judgment of a neighboring state. But who can deny, since *Mills v. Duryee*, 7 Cranch, 481, and *Hampton v. McConnel*, 3 Wheat. 234, that a judgment in one of our sister states must be holden to work the same effect upon the original demand as if it were obtained in this court? At least, the declaration shows no debt, valid within the attachment law, against L. P. Sanger." The action was on an attachment bond, and it was held that the attachment could not be sustained, because: 1. Judgments of other states were not demands to which, as judgments, the terms of the statute could be extended; and 2. The contract of L. P. Sanger was merged in the judgment against him.

The court assumed that the law of Indiana did not, in this respect, differ from the law of New York, as in the absence of proof they were bound to do; and then applying the settled rule that, under the constitution and laws of the United States, the judgments of the courts of any state are to have in every other state the same faith and credit which belong to them in the state where they were rendered, the consequence necessarily followed that a merger had taken place as to L. P. Sanger.

While the rule just stated as to the effect of judgments of one state in the courts of another is clear, as is established by the cases cited by Judge Cowen, and by numerous others, yet no case can be found where a greater effect is given to the judgment of any state in the courts of another than belongs to it in the state where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the constitution and laws of the United States on that subject, but against and irreconcilable with all policy, and with the plainest and fundamental principles of justice.

Now, it appears in this case, that by the statutes of Missouri in force at the time when the suit was instituted, which gives rise to the present question, it was enacted as follows: "All contracts, which by the common law are joint only, shall be construed as joint and several.

"In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable."

It was held in the superior court that upon these statutes no merger or extinguishment would have taken place in Missouri, so as to have there discharged the persons, other than Barber, who were bound by the original obligation. Of this, we think there can be no doubt; for any other construction would deprive the sections quoted of all beneficial effect. We are therefore of opinion that the same effect only should have been given to these sections and the judgment obtained in pursuance of them in this action.

The only defendant appearing in this case is Girty. If he shall object that there is at least a merger as to Barber, against whom judgment has been rendered in Missouri, the answer is that under the code, the joinder of a defendant, not liable at all in the action, is not a ground of defense to any one but the party not liable.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

COMSTOCK, DENIO, ROOSEVELT, PRATT, and STRONG, JJ., concurred.

HARRIS, J., delivered a dissenting opinion.

SELDEN, J., dissented.

Judgment reversed, and new trial ordered.

MERGER BY RECOVERY AGAINST ONE JOINT OBLIGOR: See notes to *Wass v. McNulty*, 43 Am. Dec. 62; *Mathews v. Lawrence*, Id. 666; *Speed's Ex'r v. Hann*, 15 Id. 81, 82; *Lawrence v. Hunt*, 25 Id. 544. As to the effect of a recovery of part as a merger of the whole demand, see *Baker v. Baker*, ante, p. 243, and citations in note thereto. Judgment recovered against one of joint makers of a note merges by operation of law, at the instance and by the act of the creditor, the whole demand. Such judgment is a bar to an action against the other joint maker of the note: *Smith and Osborne v. Kibbe*, 31 Hun, 391; *Candee v. Smith*, 93 N. Y. 352; *Shuman v. Strauss*, 52 Id. 407. This rule applies though the judgment was recovered in another state: *Greenbaum v. Stein*, 2 Daly, 224; *Mallory v. Leach*, 23 How. Pr. 508; *Baxter v. Drake*, 1 Civ. Pro. 229, all citing the principal case.

THE PRINCIPAL CASE IS CITED, and the doctrine therein enunciated approved and followed, in *Reed and Suydam v. Girty*, 6 Bosw. 567. It is mis-cited in *Ely v. McNight*, 30 How. Pr. 100.

FOREIGN JUDGMENT AS MERGER OF CAUSE OF ACTION: See note to *Wood v. Gamble*, 59 Am. Dec. 137.

CONSTITUTION OF UNITED STATES does not give to the judgment of a state, when sought to be enforced elsewhere, a greater effect than it would have in the state where it was rendered: *Wood y. Watkinson*, 44 Am. Dec. 562. Generally, as to the effect given to judgments of sister states, see *Fletcher v. Ferrel*, 35 Id. 143; *McJilton v. Love*, 54 Id. 449; *Baxley v. Linah*, 55 Id. 494; *Cook v. Thornhill*, 65 Id. 63, and citations in notes to these cases.

CURTIS v. ROCHESTER AND SYRACUSE R. R. Co.

[18 NEW YORK, 534.]

NEGLIGENCE IS NOT PRESUMED AGAINST RAILROAD COMPANY from the mere fact that a passenger sustained an injury while traveling in the cars. It may be presumed by the jury whenever the nature and attendant circumstances of the casualty show that it probably resulted from some defect in the road, cars, machinery, etc.; the passenger suing for damages is not required to trace his injury to the precise cause.

RAILROAD COMPANY IS BOUND TO PROVIDE SAFE AND SECURE CARRIAGE for the transportation of passengers. Nothing exempts it from this responsibility but the existence of latent defect which no reasonable degree of human skill and foresight could guard against. This obligation extends to every species of appliance used by the company in the business in which it is engaged.

DAMAGES RECOVERABLE FOR BODILY SUFFERING incurred by plaintiff through negligence of defendant must be limited to such as the evidence shows has been sustained before the trial, or necessarily and certainly will be sustained in the future. Probability of future suffering does not warrant an enhanced award.

APPEAL from a judgment for damages for a personal injury. Upon the trial, the evidence showed that the plaintiff was badly hurt in consequence of the derailment of a car on defendants' railroad, occurring while plaintiff was riding in it as a passenger; but did not show what defect of construction or neglect of duty caused the car to leave the track. The appeal was founded on exceptions to the judge's charge, the nature of which is shown in the opinions. The decision of the court below is reported in 20 Barb. 282.

John N. Reynolds, for the appellants.

Amasa J. Parker, for the respondent.

By Court, SELDEN, J. The judge charged the jury in this case "that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants." If by this the judge is to be understood as saying that, in cases of this kind, evidence of the mere happening of an accident, resulting in injury to the plaintiff, without proof of any of the circumstances under which it occurred, establishes, *prima facie*, the charge of negligence, I am not prepared to assent to the proposition. Carriers of passengers are not insurers; and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of the passengers; and are responsible for the slightest negligence.

But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them. In traveling in stage-coaches, upon ordinary roads, such injuries would be very frequent, because, in such cases, the proprietors of the coach do not construct the roads nor control those who travel upon them. For a large portion of the accidents, therefore, which result from defects in the road or collisions with other vehicles, the proprietors would not be liable.

The carrier, however, is in all cases bound to provide a safe and secure carriage for the transportation of the passengers; and nothing can exempt him from this responsibility but the existence of some latent defect, which no reasonable degree of human skill and foresight could guard against; and this obli-

gation extends to every species of appliance belonging to the carrier and used by him in the business in which he is engaged. Consequently, whenever it appears that the accident occurred through some defect in the vehicle, or other apparatus used by the carrier, a strong presumption of negligence arises, founded upon the improbability of the existence of any defect which extreme vigilance, aided by science or skill, could not have detected.

The cases in which the carriers would be exempt from responsibility would be far less frequent where the transportation is upon railroads than where it is upon common roads, because railroad companies have the entire control of the track and of all engaged in its use. Still, accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the roads causes numerous accidents which are not chargeable to the company. If a drunken man falls asleep, or a deaf man incautiously walks upon the road, in consequence of which a train is unavoidably thrown from the track and a passenger is injured, he is without redress as against the company. So, if a careless driver, in crossing a track, fails to get his vehicle out of the way of an approaching train. How, then, can it be assumed, without proof of any sort, when an accident has occurred, that it was caused by some carelessness on the part of the agents of the company, and not by any or either of these numerous causes?

In regard to the carriages and other apparatus used for the carrying of passengers, railroad companies are under the same obligation as that already alluded to in the case of the carrier upon common roads. They make and own their road, and have the exclusive control of that, and of every part of the machinery and apparatus used in connection with it. Passengers have no means of knowing nor any power of remedying its defects, but are forced to trust their lives and persons to the care and watchfulness of the agents of the company. The latter, therefore, is bound to see that the road and all its appurtenances are in perfect order, and free from any defect which the utmost vigilance, aided by the highest degree of knowledge and skill, could discover or prevent.

Consequently, whenever it appears that the accident was

caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company, and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arises; it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it.

If it be said that upon the same principle upon which negligence is presumed in such a case it should be presumed in every case, on account of the high degree of improbability that a serious accident of any kind should occur, without some degree of negligence, the answer is plain; and to present this distinction is the object of most that has been said. There may be a presumption of negligence in every case, but where nothing is known in regard to the cause of the accident, the negligence may as well have been that of some one residing in the vicinity of the road, or of some stranger, of whom numbers come in contact with it every day, as of any of the employees of the company; while if it appears that the mischief has resulted from a defect in some part of the apparatus of the company, the negligence, if any, must have been that of some one for whose acts and omissions the company is liable; it being well settled that the carrier is responsible for the negligence or want of skill of every one who has been concerned in the manufacture of any portion of its apparatus: *Hegeman v. Western R. R. Co.*, 13 N. Y. 9 [64 Am. Dec. 517]; *Ware v. Gay*, 11 Pick. 106; *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346].

The cases in which it has been said that a presumption of negligence arises from the mere proof that an accident has occurred will appear, if examined, not to conflict materially with these principles; and some of them are, I think, illustrative of the distinction just suggested. The leading cases on the subject are those of *Christie v. Griggs*, 2 Campb. 79; *Stokes v. Salstonstall*, 13 Pet. 192; *Carpue v. London and Brighton Railroad Company*, 5 Q. B. 747; *Laing v. Colder*, 8 Pa. St. 479 [49 Am. Dec. 533].

In *Christie v. Griggs*, *supra*, where Sir James Mansfield is supposed to have laid down the proposition in question, it was proved that the injury was caused by the breaking of the axle-tree of the coach, upon the top of which the plaintiff was seated; and it was in view of this proof that the chief justice made the remark that "the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the

damage he had suffered." There is no doubt that in such a case negligence should be presumed, for the reasons which have been given.

In the case of *Stokes v. Salstonstall*, 13 Pet. 192, which was also an action against the proprietors of a line of stage-coaches, the court instructed the jury that the "facts that the carriage was upset, and the plaintiff's wife injured, were *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault." Taken abstractly, this instruction, which was sustained by the court, might seem to be in conflict with the principles here contended for; but if understood in reference to the proof, it is otherwise.

The plaintiff had proved not only the accident and the injury, but that the passengers had remarked that the driver appeared intoxicated, and so told the agent of the proprietor; that the road was perfectly level, and not dangerous or difficult; and that the reckless conduct of the driver had called out repeated remonstrances from the passengers, which were wholly unattended to. Here was ample proof of negligence, and the judge must have had these circumstances in view when he made his remarks to the jury. The happening of the accident, under the circumstances proved, was undoubtedly *prima facie* evidence of negligence.

The other two cases were actions for injuries upon railroads. In that of *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747, it appeared that the position of the rails had been somewhat deranged at the spot where the injury took place; and the chief justice charged the jury that, it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced. This is in perfect accordance with the principles which have been here advanced. *Laing v. Colder*, 8 Pa. St. 479 [49 Am. Dec. 533], is perhaps the strongest case in support of the doctrine against which we contend. When that case was heard *in banco*, Bell, J., said: "The mere happening of an injurious accident raises *prima facie* a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist." But the charge of the judge at the circuit upon which the question arose was not so broad. He

instructed the jury that "in the present case, the presumption was there had been negligence," a charge fully justified by the proof, which was that the accident occurred while the car was crossing a bridge, which was so narrow that the plaintiff's hand, lying outside the car window, was caught by the bridge and his arm broken. It was palpable negligence on the part of the company so to construct the bridge.

In no instance that I am aware of has it been said by any judge that negligence, on the part of the carrier, was to be presumed from the mere happening of an accident, except where the facts proved in the particular case fully warranted the presumption upon the principles here insisted upon.

The views here presented are, I think, sustained by the opinion of this court in the case of *Holbrook v. Utica and Schenectady R. R. Co.*, 12 N. Y. 236 [64 Am. Dec. 502]. Ruggles, J. there says: "In actions like the present, the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff. The same rule applies as in an action for an injury to a passenger in a stage-coach. It generally happens, however, in cases of this nature, that the same evidence which proves the injury done proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown."

It does not follow from what has been said that the judgment in this case is to be reversed for error in that part of the charge referred to. The very first witness called by the plaintiff upon the trial proved enough of the circumstances of the case to warrant the presumption of negligence. It was clear from his testimony that the accident was caused by some defect in the track, and in all probability by the misplacement of the switch. It was immaterial, however, whether it was this or the spreading of the rails, as the company sought upon cross-examination to show, which threw the train from the track. In either case, the presumption of negligence would arise. The judge was fully warranted in instructing the jury that the occurrence of the accident, under the circumstances disclosed by the evidence, authorized the presumption of negligence. Did he do more than this? He did not say to the jury, in the language of Judge Bell, in *Lain v. Colder*, 8 Pa.

St. 479 [49 Am. Dec. 533], that "the mere happening of an injurious accident" raises a presumption of negligence; but his words were that "the fact of this accident occurring" was presumptive evidence, etc. The effect is attributed, not to any and every accident, but to this particular accident. A verdict like this, sustained as it is by ample evidence, ought not to be disturbed by a construction which would make the charge a mere abstraction, not called for by the exigencies of the case, provided any other interpretation is admissible. There is no reason to suppose that the jury were misled. They were carefully instructed, that if the injury was the result of pure accident, without any neglect of the defendants, the plaintiff could not recover; and under the view which has been taken, the charge, so far as the exception under consideration is concerned, may, I think, be properly sustained.

A question also arises upon that part of the charge in which the jury were told that in estimating the damages they would be justified in taking into consideration "the bodily pain and suffering which the plaintiff suffered, or was likely to suffer, in consequence of the neglect of the defendants." This instruction, in so far as it relates to future pain and suffering, is clearly erroneous; and if it had not been subsequently modified, the error would, I think, have been necessarily fatal to the judgment. There is no doubt that bodily pain and suffering is a proper item of damages in such cases: *Ransom v. New York and Erie R. R. Co.*, 15 N. Y. 415. Nor is the estimate necessarily limited to suffering which is past, where the proof renders it reasonably certain that future pain and suffering is inevitable.

In estimating the pecuniary loss in such cases, all the consequences of the injury, future as well as past, are to be taken into consideration; and there seems to be no reason why a different rule should prevail in respect to bodily pain and suffering. But the objection to the charge is, that it authorizes an allowance of damages for future pain, which is rendered probable merely. Damages are to be proved; and none can be allowed except such as are shown by the proof to be, at least to a reasonable degree, certain.

The error, however, was corrected upon the trial. The judge, upon his attention being called to the point, further instructed the jury "that future damages could only be awarded when it is rendered reasonably certain from the evidence that such damages will inevitably and necessarily result from the origi-

nal injury." With this qualification, I see no objection to the charge on this subject, and this exception also should therefore be overruled.

The judgment should, I think, be affirmed.

GROVER, J. August 7, 1852, the plaintiff took passage in the defendants' cars at Geneva for Auburn. As the train was passing Waterloo it ran off the track and the plaintiff was injured. The court, among other things, charged the jury that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants, and it lay with them to explain it and to prove that they were not negligent in order to discharge them from liability to the plaintiff; to which the defendants excepted. The plaintiff was bound to prove her cause of action. That was that she had received an injury caused by the negligence of the defendants. The negligence of the defendants must be proved by the plaintiff, as well as the reception of the injury. It was not enough for her to prove that while a passenger upon the defendants' cars she was injured. In this case, proof was given that the cars ran off the track, and that this occasioned the injury. It was in reference to this evidence that the judge charged the jury that the fact of this accident occurring was presumptive evidence of negligence on the part of the defendants. The question is, whether the plaintiff was bound to go further, and show the particular cause of the cars being thrown from the track, or whether it was for the defendants to show that it was accidental and without neglect upon their part. This question may be determined upon principles applicable to all modes of carrying passengers. It is the duty of all engaged in this business in any mode to use care to secure the safety of the passenger, proportioned to the danger incident to the mode of conveyance. In case this care is applied as a general result, the safety of the passenger will be secured, so far as that safety depends upon the state or condition of any of the means provided by the carrier and used in the business. If there is no imperfection in any of these, and suitable caution is employed by those engaged in their application, everything dependent thereon will accomplish the end in view. This is as certain as the laws of mechanics. When, therefore, an injury is received from a derangement of anything employed by the carrier, the presumption necessarily arises that there existed somewhere an imperfection in the machinery employed, or negligence in its application.

It is the duty of the carrier to provide perfect machinery, and if he has failed in this, it devolves upon him to show the excuse, if any. This is the rule applicable to all cases where a party seeks exoneration from a duty imposed upon him by law or incurred by contract. The plaintiff has established his cause of action when he has shown a failure to perform the duty from which he has sustained an injury.

It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hardship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who, instead of conveying him safely, inflicts an injury upon him by the failure of some part of the machinery employed by him. In many cases it would be impossible for the plaintiff to ascertain the particular defect, and, I think, no such obligation is imposed upon him by the rules of evidence. The authorities are uniform in favor of the rule held by the judge: *Stokes v. Saltonstall*, 13 Pet. 181; *Carpue v. London and Brighton R. R. Co.*, 5 Q. B. 747; *Holbrook v. Utica etc. R. R. Co.*, 16 Barb. 113, and cases there cited. The same rule is laid down by the elementary writers: Angell on Carriers, sec. 569; 2 Greenl. Ev. 222. The defendants' counsel cites the case of *Holbrook v. Utica & S. R. R. Co.*, 12 N. Y. 421 [64 Am. Dec. 502], in opposition to the rule. I understand that case as substantially sustaining the rule as laid down by the judge in his charge in this case. Ruggles, J., says that if the witness who swears to the injury testifies, also, that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises. Just so when it is proved that the injury arose from any derangement, crush, or displacement of the track or cars.

The exception to that portion of the charge holding that the plaintiff could recover a compensation for bodily pain suffered, or that she was likely to suffer, is general; and it is settled that such an exception is unavailing when any portion of the charge thus excepted to is correct.

In *Ransom v. New York and Erie R. R. Co.*, 15 N. Y. 415, it was decided by this court that bodily pain and suffering arising from an injury was a proper subject for pecuniary compensation.

This exception does not render it necessary to examine that

portion of the charge holding that the plaintiff could recover for pain and suffering likely to be suffered. In this case the judge, I think, laid down the true rule, in substance, in regard to future pain and suffering, in another portion of his charge: that the plaintiff could only recover damages for such pain and suffering as the evidence rendered reasonably certain would necessarily result from the injury. But as remarked above, the exception is too general to present any question as to future pain.

The judge was correct in refusing to charge the jury, as requested, that the uncontradicted proof shows that the switch was rightly placed for the train in which the plaintiff was a passenger, and awaiting its approach, and that this rebutted any presumption of negligence arising from the accident. There was evidence tending to show that the train ran off the track at the point of approach to the switch.

This was evidence tending to show that the switch was improperly placed, and proper for the consideration of the jury upon that question.

The judgment should be affirmed.

DENIO and COMSTOCK, JJ., did not sit in the case.

All the other judges concurred.

Judgment affirmed.

NEGLECTANCE IS NOT PRESUMED FROM FACT that a railroad passenger is injured. The passenger must prove that the circumstances attending the injury were such as raise a reasonable presumption that it was caused by some fault or want of care on the part of the company's servants: *Holbrook v. Utica etc. R. R. Co.*, 64 Am. Dec. 502, and citations in note thereto 505. But when a passenger is injured while traveling upon a railroad train, without fault of his own, the law raises a presumption of negligence on the part of the company, and throws upon it the *onus* of showing that negligence did not exist: *Sullivan v. Philadelphia etc. R. R. Co.*, 72 Id. 689, and cases in note 702. As a general rule, the burden of showing negligence on the part of the party occasioning an injury is on the party seeking to recover; yet when he has shown a situation which could not have been produced, except by the operation of abnormal causes, the *onus* then rests upon the party causing the injury to show that it was occasioned without his fault: *Seybolt v. N. Y., L. E., & W. R. R. Co.*, 95 N. Y. 508. Where a railroad passenger receives an injury caused by the cars running off the track, he may rely upon this fact as evidence of negligence. Still the *onus* is upon him to establish to the satisfaction of the jury that his injury was caused by the negligence of the company. Unless he satisfies the jury of this fact affirmatively, from the evidence, he is not entitled to recover: *Lamb v. Camden etc. R. R. Co.*, 46 Id. 279; *Warner v. New York Cent. R. R. Co.*, 44 Id. 471. When it is proved that the car, while running at a very moderate rate of speed, went off the track, and

colliding, was destroyed, it is not an unjustifiable or an unreasonable inference that this was caused by some defect in the car or the road, or both: *Edgerton v. New York etc. R. R. Co.*, 35 Barb. 198; and in itself justifies a strong presumption of negligence in the company: S. C., Id. 395; S. C., 39 N. Y. 229; *Mullen v. St. John*, 57 Id. 572. So proof showing that the car ran off the track shows some defect or deficiency in the road, or the machinery with which it was operated, and presents a *prima facie* case of negligence on the part of the company, entitling the injured party to recover: *Brignoli v. Chicago etc. Railway Co.*, 4 Daly, 184. And again, the nature of the accident may, of itself, afford *prima facie* proof of negligence on the part of the company: *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 127, all citing the principal case.

LIABILITY OF PASSENGER CARRIERS for defects in their vehicles or appliances: *Hegeman v. Western R. R. Corp.*, 64 Am. Dec. 517, and extended notes thereto 521-528, discussing this question in all its bearings. And see also *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323; *Farish v. Reigle*, Id. 666, and citations in notes to these cases. Railroad companies are bound to see that the road with all its appurtenances are in perfect order and free from any defect which the utmost vigilance, aided by the highest skill, can discover and prevent. Consequently, whenever it appears that an accident was caused by any deficiency in the road, cars, or any portion of the appliances belonging to the company and employed in its business, a presumption of negligence on the part of the company arises, as it is not likely that any existing defect would be of so hidden a nature that no degree of foresight or skill could have discovered it: *Brehm v. Great Western R'y Co.*, 34 Barb. 269; *Edgerton v. New York etc. R. R. Co.*, 39 N. Y. 229. Railroad company is bound to construct its track with all possible care, and to keep it in a safe and proper condition. It is bound also to exercise the same care and skill in regard to all appliances used on the road, or in or about the cars, and to employ as its agents careful, skillful, and competent men: *Perkins v. New York C. R. R. Co.*, 24 Id. 219. And when an accident happens, it is incumbent upon the company to show that the accident happened from causes over which it had no control: *Reed v. New York C. R. R. Co.*, 56 Barb. 499. But the company is not liable for accidents which no practicable degree of care or skill could have foreseen or discovered: *Garrison v. Mayor etc. of New York*, 2 Bosw. 502, all citing the principal case.

RULE OF DAMAGES FOR PERSONAL INJURY inflicted by negligence is loss of time during the cure, expense incurred in respect to it, the pain and suffering undergone by plaintiff, and any permanent injury, especially when it causes a disability from future exertion, and consequent pecuniary loss: *Peoria Bridge Association v. Loomis*, 71 Am. Dec. 263; *Hopkins v. Atlantic etc. R. R. Co.*, 72 Id. 287, and citations in notes to these cases. In actions for injuries to the person, occasioned by the negligence of a railroad company, the party injured may recover damages for his pain and suffering; not only down to the time of the trial, but future suffering, which the evidence renders reasonably certain must necessarily result from the injury, may also be compensated: *Hamilton v. Third Avenue R. R. Co.*, 35 N. Y. Super. Ct. 130; S. C., 44 How. Fr. 298; *Sheehan v. Edgar*, 58 N. Y. 631; *Filer v. New York C. R. R. Co.*, 43 Id. 45; *Aaron v. Second Avenue R. R. Co.*, 2 Daly, 129; *Strohm v. N. Y., L. E., & W. R. R. Co.*, 96 N. Y. 306; *Williams v. Vanderbilt*, 28 Id. 225; *Swarthout v. New Jersey Steamboat Co.*, 46 Barb. 226; S. C., 48 N. Y. 211; *Covert v. Gray*, 34 How. Fr. 462; *Matteson v. New York etc. R. R. Co.*, 62 Barb. 379. The inquiry as to the amount of damages to be allowed necessarily involves

consideration of the position of the injured party in life, the business or profession in which he was engaged, the means at his command to earn money, and the extent to which they are affected in consequence of such injury: *Brignoli v. Chicago etc. R'y Co.*, 4 Daly, 186. But the only damages that may be recovered are such as the proof shows to be reasonably certain of occurrence: *Langley v. Sixth Avenue R. R. Co.*, 48 N. Y. Super. Ct. 543; *Macer v. Third Avenue R. R. Co.*, 47 Id. 467, all citing the principal case.

HALL v. NAYLOR

[18 NEW YORK, 588.]

FRAUD IN PURCHASING GOODS for which the buyer knows, but does not disclose, that he has not means to pay, being a question of intent, evidence is admissible that he made other purchases with like concealment; but such other transactions must be so near to the one in suit in point of time, and so like it in other relations, that the same fraudulent motive may reasonably be imputed to all.

EVIDENCE IS NOT ADMISSIBLE that the buyer made false statements as to his pecuniary circumstances, with a different object from that of inducing a sale of goods; as, to induce a creditor to forbear pressing for payment of a demand not yet due.

LAW DOES NOT DENY POSSIBILITY OF HONEST PURCHASE OF GOODS on credit by an insolvent person without a disclosure of the fact of insolvency. The true point of inquiry is, whether there was a preconceived design not to pay for the goods. This is a question for the jury under all the circumstances in the case.

APPEAL from a judgment of the New York superior court, in an action by a seller of goods, John Hall, to recover them back from buyers' assignee in trust for creditors, Joseph Naylor, on the ground that the buyers, Kerr & Co., knew and concealed their insolvency when making the purchase. The decision appealed from is reported in 6 Duer, 71. The cause was submitted.

P. T. Woodbury, for the appellant.

Albert Mathews, for the respondent.

By Court, COMSTOCK, J. It does not appear that Kerr & Co., on purchasing the goods in question, made any representations of their ability to pay for them. If, however, they concealed the fact of their insolvency, with a design of procuring the goods and not paying for them, it was a fraud which rendered the sale void, if the plaintiff chose so to regard it. On the trial of such an issue, the *quo animo* of the transaction is the fact to be arrived at; and it is therefore competent to show that the party accused was engaged in other similar frauds at or

about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all: *Cary v. Hotailing*, 1 Hill (N. Y.), 311 [37 Am. Dec. 323], and cases cited. It is not necessary, however, that the means of accomplishing each fraud should be the same.

Where the question is whether goods have been procured by a fraudulent suppression of facts material to credit given, it will be competent to prove that, in other instances, they have been obtained by actual misrepresentation concerning the same facts. The concealment in one case, and false representation in the other, are evidence merely of a fraudulent design, common to both transactions, of procuring goods without the ability or the intention to pay for them. These observations are a sufficient answer to several objections which were taken at the trial to the admission of the evidence.

There was, however, one objection which does not admit of an answer within the rules of evidence which govern in cases of this kind. It appears that about two months before the sale in question, Kerr & Co. bought goods on credit of one Morlot. There is no pretense that there was any fraud in that purchase. Kerr & Co. therefore had a right to keep those goods and dispose of them as they pleased. But Morlot, becoming alarmed for the safety of his debt, requested them to pay some of their notes in advance.

This they said they were not prepared to do, but they offered to return the goods if he required, at the same time affirming that the notes would be paid when due; that they were doing a good business, and were making money. On the strength of these representations, Morlot, as he testified, allowed them to retain the goods, for which they owed a considerable sum at the time of their failure. I can find no principle to justify the admission of this evidence. It may be conceded that the representations to Morlot were untrue, and that Kerr & Co. knew them to be so; yet the law will not consider them as fraudulently made, because the goods were already in possession of Kerr & Co., and unqualifiedly belonged to them. The only object and the only effect which these representations could have would be to quiet the apprehensions of a creditor who had no pretense of right to reclaim the property sold, and whose debt was not yet due, and could not be enforced. As this transaction, therefore, was not fraudulent, it could have no legitimate bearing upon the issue which was on trial, and

consequently the evidence ought not to have been allowed to go before the jury.

In another respect, there is some difficulty in sustaining the judgment of the court below. At the trial, the defendants insisted, in different forms of expression, that the concealment merely by Kerr & Co. of their pecuniary circumstances did not necessarily avoid the sale, even if they believed themselves to be insolvent; and the judge was requested to charge in accordance with this doctrine.

So, at least, I understand the request; and, so understanding it, the defendant was entitled to have the jury instructed accordingly. The law does not deny the possibility of an honest purchase of goods on credit by an insolvent person, without a disclosure of the fact. He may have not only an intention of paying for them when the credit expires, but a reasonable expectation of being able to do so. The true point of inquiry in such cases is, whether there was a preconceived design not to pay for the goods. That inquiry the jury must solve, taking into their consideration the concealment, and all the attending and subsequent circumstances admitted in evidence which may serve to throw light upon that issue: *Nichols v. Pinner*, 18 N. Y. 295.

It is claimed that in the charge actually given to the jury the judge recognized the rule to be, in substance, as it is here stated. Such was, perhaps, his intention. But the charge was certainly open to criticism. In one connection he correctly stated the inquiry to be, whether Kerr & Co. bought the goods with intent not to pay for them. But in another, he told the jury that, if knowing their insolvency they did not disclose the fact, they acted fraudulently. I concede that the jury might have so found upon all the circumstances; still, the proposition was not universally and unqualifiedly true. Connecting the charge with the refusal to respond to the requests made by the defendant's counsel, the jury were, quite likely, left in doubt as to the true rule on the subject. This obscurity will, no doubt, be avoided on another trial; and it is for that purpose mainly that this branch of the case has been referred to. We think the judgment must be reversed, and a new trial granted for the error above considered, in receiving evidence of the representations made to Morlot.

JOHNSON, C. J., and DENIO, SELDEN, ALLEN, and GROVER, JJ., concurred.

STRONG, J., dissented.

GRAY, J., expressed no opinion.

Judgment reversed, and a new trial ordered.

WHEN PURCHASE IS CLAIMED to have been fraudulent, evidence of distinct fraudulent purchases, made at or about the same time as the purchase under consideration, is admissible: *Cary v. Hotailing*, 37 Am. Dec. 323, and note 328; *Davenport Glucose Mfg. Co. v. Taussig*, 31 Hun, 566; *Stewart v. Potter*, 37 How. Pr. 70; *Durbrow v. McDonald*, 5 Bosw. 142; *Müller v. Barber*, 66 N. Y. 508; *Viele v. Goss*, 49 Barb. 98; *Brett v. Catlin*, 47 Id. 409; *Ballard v. Fuller*, 32 Id. 71. It is not necessary that the vendor should have had notice of other fraudulent sales before he sold, or that the purchaser should have intended that he should have such notice, in order to give them in evidence: *Van Kleeck v. Leroy*, 37 Id. 552. In order to render such evidence admissible, the transactions must be so connected as to time, and so similar in their other relations, that the same motive may be reasonably imputed to them all: *Weyman v. People*, 6 Thomp. & C. 699; S. C., 4 Hun, 517; *Mayer v. People*, 80 N. Y. 375, note. But a representation made to a former seller, who has become alarmed, where the debt is not due, is not competent evidence: *Van Kleeck v. Leroy*, 4 Abb. App. Cas. 481; S. C., 4 Abb. Pr., N. S., 433; and the rule of evidence admitting contemporaneous similar acts as evidence of fraudulent intent has never been extended so far as to make similar contracts evidence of similar representations: *Strong v. Place*, 4 Robt. 393, all citing the principal case.

WHERE PROPERTY IS OBTAINED from another upon credit, with a preconceived design on the part of the buyer to cheat and defraud the seller out of the same, the seller, upon the discovery of the fraud, may avoid the contract and retake the property, unless it has passed to the possession of a *bona fide* purchaser for value: *Nichols v. Michael*, 23 N. Y. 266. So a buyer with the preconceived design not to pay for the goods is a fraudulent purchaser, and gets no title. But an actual insolvency at the time of the purchase, accompanied with an honest expectation on the part of the buyer that he will be able to retrieve his fortunes and pay the debt, and where no representation is made, does not necessarily constitute a fraud: *Van Kleeck v. Leroy*, 4 Abb. Pr., N. S., 433; S. C., 4 Abb. App. Cas. 481; all citing the principal case.

QUESTION OF FRAUDULENT INTENT in sale of goods is for the jury: *Bidault v. Wales*, 59 Am. Dec. 327; S. C., 64 Id. 205; *Linn v. Wright*, 70 Id. 232, and citations in notes to these cases.

BANK OF ROME v. VILLAGE OF ROME.

[19 NEW YORK, 20.]

COUPON BONDS, SUCH AS ARE ORDINARILY ISSUED by municipal corporations in aid of construction of railroads, are negotiable instruments; and a person who acquires them from the railroad company, for value and in reliance upon an official certificate which they contain of the facts authorizing them to be issued, is entitled to recover upon them, notwithstanding matters of defense which the municipality might raise against the company.

APPEAL from a judgment of the supreme court sustaining the right of a *bona fide* holder for value of a bond issued by the village of Rome, to recover the interest which had become due by the terms of the bond. The facts appear in the opinions. For further history of the cause, see the decisions of the supreme court reported in 27 Barb. 65; and of the court of appeals, in 18 N. Y. 38.

Samuel Beardsley, for the appellant.

Francis Kernan, for the respondent.

By Court, GROVER, J. The question whether the act passed May 27, 1853 (c. 283), conferring power upon the defendant to subscribe for stock in the Ogdensburgh, Clayton, and Rome Railroad Company, is constitutional and valid, was decided by this court between these same parties against the defendant at the last September term (18 N. Y. 33), and no question upon this ground is now made; nor upon the approval of the act by the electors of the village of Rome, pursuant to the ninth and tenth sections. The plaintiff, upon the trial, introduced in evidence the certificate of the commissioners of the railroad fund of Rome, which was in all respects as required by the eleventh section of the act, but gave no further evidence showing that five hundred thousand dollars had been subscribed to the stock of the railroad company prior to the issuing of the bond and coupon in suit by the commissioners. The defendant moved for a nonsuit upon the ground that there was no proof that five hundred thousand dollars had been subscribed to the stock of the said company. The motion was denied by the court, and the defendant excepted. The defendant offered proof tending to show that five hundred thousand dollars of valid subscriptions had not, in fact, been made to the capital stock of the railroad, which evidence was rejected, and the defendant excepted.

By the eleventh section of the act it is provided that the commissioners of the railroad fund of Rome shall have no power or authority to negotiate, sell, or transfer the bonds issued under the act, except upon the express condition that five hundred thousand dollars shall have been first subscribed to the capital stock of the railroad company, exclusive of the subscription thereto by the defendant; and that said commissioners, before negotiating, etc., any of said bonds, should make and subscribe a certificate in writing that such subscription had actually been made, and in their judgment and

belief, in good faith, and by persons of ability sufficient to pay their subscriptions in full, and that such certificate should be filed with the clerk of the board of trustees of the village of Rome. The exception of the defendant to the refusal of the judge to nonsuit the plaintiff presents the question whether the certificate of the commissioners is any competent evidence that the subscription to the capital stock of the railroad company had been made as required by the eleventh section; and the exception to the rejection of the proof offered by the defendant, the further question whether such certificate was conclusive evidence that such subscription had been made.

Upon looking at the various provisions of the act in question, it will be seen that the object of the legislature was to enable the defendant to aid in the construction of the railroad specified in the act, and to protect the people from being involved in an abortive enterprise. To accomplish this, authority is given to issue the bonds of the defendant as prescribed in the act, when, among other things, five hundred thousand dollars, exclusive of the defendant's subscription, should have been in good faith subscribed to the capital stock of the railroad company by persons of sufficient ability to pay their subscriptions in full. A certificate of those facts is to be made by the commissioners and filed with the clerk of the board of trustees. The commissioners are, by the fourth section of the act, made subject to the control of the board of trustees of the defendant in the performance of their duties, and responsible to them for the faithful discharge thereof. The good faith of the subscriptions and the ability of the subscribers to pay are obviously of at least equal importance to the defendant as the formal making of the subscriptions; and yet the act is entirely silent as to these particulars, except in the requisites of the certificate of the commissioners. Their certificate is the only evidence required of these facts. Why require the commissioners to certify to the amount of subscriptions at all, if no effect is to be given to the certificate when made? It cannot be said, if this be so, that they would be liable to the defendant for making a false certificate. The defendant would not, in that case, be liable upon the bonds, and consequently would sustain no damage. I think if anything more than the certificate of the commissioners, as to the subscriptions, their quality, or amount, had been deemed necessary by the legislature for the protection of the village of Rome, the act would have provided for it. It was contemplated by the act that the bonds should be sold in

the market. This would be impracticable if every purchaser must at his peril investigate the amount of the subscriptions and ascertain whether each was valid. I think that the true construction of section 11 makes the certificate of the commissioners conclusive evidence of the amount as well as quality of the subscriptions to the stock of the railroad, as between the defendant and the holder of the bonds issued by virtue of the act. The judgment should therefore be affirmed.

COMSTOCK, J. It was not pretended on the argument that the subscription of the village of Rome to the stock of the railroad company and the execution and delivery to the commissioners of the village bonds were unauthorized acts. The scheme of taking the stock and creating a debt of one hundred and fifty thousand dollars had been duly approved by the tax-payers. The execution of the bonds was therefore authorized and perfect, and the "commissioners of the railroad fund" held them for sale and disposition according to certain further conditions prescribed in the eleventh section of the statute: Laws of 1853, 596. By that section the commissioners were authorized to negotiate these bonds so as to make them operative instruments, only on condition that the sum of five hundred thousand dollars should be subscribed to the stock of the railroad, exclusive of the village subscription of one hundred and fifty thousand dollars; and the commissioners were directed, before selling the bonds, to make a certificate under their hands, declaring that such subscription had, in fact, been made in good faith by persons able to pay the sums subscribed by them. This certificate was to be filed with the clerk of the village of Rome, and it was, in fact, made and filed in all respects according to the law. The facts, so far stated, had been proved when the motion for a nonsuit was made, together with the additional one that the commissioners delivered the bond on which the suit was brought to the railroad company in exchange for an equal amount of stock in that company. This was a mode of negotiation authorized by the statute (section 3).

It follows that the motion for a nonsuit was properly overruled. The bonds were payable to bearer, and although under the corporate seal of the village, they were negotiable instruments in such a sense as would exempt them, in the hands of a *bona fide* holder, from a defense which might be available against the railroad company: *State of Illinois v. Delafield*, 8 Paige, 527; S. C. on appeal, 2 Hill (N. Y.), 159, 177; *Mechanics'*

Bank v. New Haven R. R. Co., 13 N. Y. 625, 627; *Fisher v. Morris Canal Co.*, 3 Am. Law Reg. 423. If, in point of fact, the commissioners delivered the bonds to the railroad company in exchange for stock, without a performance on the part of that company of the condition precedent of procuring a subscription of five hundred thousand dollars to the stock, it is quite probable that the company itself could not enforce the bonds, although the proper certificate had been filed, declaring the condition to have been performed. By the express terms of the statute, the subscription was to precede the sale of the bonds, and I do not see how the company could get a title to them unless it procured that subscription to be actually made.

But the question is very different where the rights of a *bona fide* holder are concerned. The bonds, as we have seen, were executed by due authority; the only defensive allegation being that they were improperly issued and thrown upon the market by the commissioners. Admitting this allegation to be true, I think it is no defense. It is true that every person purchasing one of these bonds in market knew, or was bound to know, what were the conditions under which they could be lawfully issued. These were prescribed in the statute. But the same statute required a certificate to be made, which was to become a public record, declaratory of the fact that all the conditions had been performed. In the case of *State of Illinois v. Delafield*, 8 Paige, 527, state bonds or stocks had been prepared and executed by the officers having due authority of law; the purpose being to sell them in order to raise funds for the construction of a canal. They were put into the hands of agents for sale, who sold and delivered them in violation of an express provision of the law which authorized their creation. It was held by the chancellor—and, on appeal, by the court of errors—that the bonds would be obligatory upon the state of Illinois in the hands of *bona fide* holders; and on that ground the defendant, Delafield, was restrained from selling or disposing of them. That decision rested on a principle entirely familiar in the law of negotiable paper, and of no doubtful application to the present case. If the commissioners abused or transcended their powers in the sale of the bonds in question, the statute under which they acted made them personally liable to the village of Rome (section 4). But such abuse or excess of power would not affect parties purchasing the bonds in good faith, beyond the means which the statute itself pro-

vided for ascertaining the facts on which the exercise of the power depended. Those facts were to be declared in the certificate before mentioned. That being made and filed, as the law required, and the bonds being actually issued by the commissioners, they could be safely bought in the market like other negotiable instruments. It is, indeed, scarcely possible that the legislature could have any other design in requiring such a certificate to be made.

The motion for a nonsuit having been denied, the defendant offered to prove in substance that, although the railroad company procured a subscription of over five hundred thousand dollars, the per cent thereon had not been paid in, as required by the general railroad act (Laws of 1850, p. 211, sec. 4), at the time the commissioners made and filed their certificate. The evidence was rejected; and the decision was right upon two grounds: 1. The subscribers to the stock could not, as I now think, but without a particular examination of the question, repudiate their subscriptions on the ground that they had failed to pay down ten per cent; 2. The certificate of the commissioners that five hundred thousand dollars had been subscribed, etc., was conclusive evidence of the fact, as between the village of Rome and parties who purchased the bonds in good faith. The reasons for this conclusion have already been suggested.

The judgment should be affirmed.

DENIO and GRAY, JJ., expressed no opinion.

All the other judges concurred.

Judgment affirmed.

COUPON BONDS ARE NEGOTIABLE: See exhaustive note on the subject of coupons, *Morris Canal etc. Co. v. Fisher*, 64 Am. Dec. 428-445. In this note is also treated the conclusiveness of recitals in coupon bonds. That county railway-aid bonds are negotiable instruments, see also *Clapp v. County of Cedar*, 68 Id. 678.

THE PRINCIPAL CASE IS CITED in each of the following cases and to the point stated: The legislature can confer on officers of towns power to subscribe for railroad stock and issue bonds in payment therefor, but the power is possessed in consequence of legislative enactment, and not otherwise: *Town of Duaneburgh v. Jenkins*, 40 Barb. 579; S. C. in court of appeals, 57 N. Y. 186, 187; *Williams v. Town of Duaneburgh*, 66 Id. 140. Bonds are negotiable instruments, and the title will pass by delivery, and they will be valid as securities in the hands of a *bona fide* holder, even though they might not be valid in the hands of the party from whom they were received: *Finnegan v. Lee*, 18 How. Pr. 188; *Lindsley v. Diefsendorf*, 43 Id. 359; *Hardenbergh v.*

Van Keuren, 16 Hun, 25; *People v. Mead*, 24 N. Y. 125; *Brainerd v. N. Y. & H. R. R. Co.*, 25 Id. 500; *People ex rel. Martin v. Brown*, 55 Id. 199; *Colson v. Arnot*, 57 Id. 258; *Birdsall v. Russell*, 1 Robt. 551. The principal case is discussed and approved in *Starin v. Town of Genoa*, 23 N. Y. 429, at pages 452, 453. It was also shown to be consistent with the latter case. In *Clark v. City of Rochester*, 28 Id. 634, the principal case was distinguished from *Barto v. Himrod*, 8 Id. 483.

VAN RENSSELAER v. HAYS.

[19 NEW YORK, 68.]

PRINCIPLE OF STATUTE "QUIA EMPTORES" (18 Edw. I.), allowing freemen to sell their lands, but subject to the grantee's rendering the services, etc., due to the lord, was a part of the law of the colony and state of New York, before and independent of the law of 1787 abolishing tenures.

ANNUAL RENT RESERVED BY GRANT IN FEE containing a clause of distress is a valid rent-charge, notwithstanding the person entitled to it may not be a reversioner. Such charge, though not strictly an estate in the land, is a descendible hereditament.

LESSOR'S RIGHT TO RECOVER RENT reserved in a lease in fee containing covenant for payment, and his remedies for enforcing payment, are assignable (by force of N. Y. Laws 1805, c. 98, sec. 3, if not at common law) with effect to enable the assignee to proceed in his own name.

STATE LAW MAKING RIGHT OF ENTRY FOR NON-PAYMENT OF RENT ASSIGNABLE (such as N. Y. Laws 1805, c. 98, sec. 3, continued in 1 Rev. L. 1813, 364, sec. 3, and 1 Rev. Stat. 748, sec. 25) may be applied to reservations of rent in conveyances and leases made before passage of the law, without incurring the objection that it impairs the obligation of contracts, and therefore violates the federal constitution. Such a provision affects the remedy, not the contract.

APPEAL from a judgment of the supreme court for arrears of rent adjudged to be due upon one of the ancient "manor leases," formerly so well known in New York state. The lease or grant in question was made in 1796 by Stephen Van Rensselaer. It granted the lands described to Jacob Dietz in fee, reserving an annual rent in produce; and it contained a covenant by the grantee for himself, his heirs, executors, etc., and assigns, for the payment of the rent to the grantor, his heirs and assigns; also a clause authorizing the grantor, etc., in case of non-payment of rent, to proceed by distress or by action at his option; and another reserving right of re-entry in case of any breach of covenant. The plaintiff claimed the rights of the lessor under a devise from Van Rensselaer; and the defendant claimed those of lessee under assignment from Dietz. The action was tried by the court without a jury, and judgment rendered in favor of plaintiff for rent as claimed. A similar

action was brought against one Smith, and two actions were brought against two other tenants under like leases (Ball and De Friest), to recover possession of the demised premises under the clauses reserving right of re-entry for breach of covenant to pay rent; and these three actions also resulted in judgments for the plaintiff. The four actions were appealed to the general term of the supreme court, and were argued and decided together (*Van Rensselaer v. Smith*, 27 Barb. 104); the claim of the plaintiff to proceed for recovery of rent in arrear, or for possession of the premises, at his option, being sustained. The four defendants appealed to this court from the judgments of the supreme court against them; and apparently the four appeals were argued together: Cases Court of Appeals, in state law library at Albany, vol. 81. The following opinion was rendered, entitled in the action against Hays; a separate opinion entitled in another of the four actions is reported in *Van Rensselaer v. Ball*, 19 N. Y. 100.

John H. Reynolds and Anson Bingham, for the appellant.

Charles M. Jenkins, for the respondent.

By Court, DENIO, J. The defendant's position is, that the covenant for the payment of the rent is, in law, personal between the grantor and grantee, or what is sometimes called in the books a covenant in gross, and consequently, that after the death of the original parties no action to recover rent can be maintained in favor of or against any persons except their respective executors or administrators. As the law contemplates that the estates of deceased persons shall be speedily settled, and in the natural course of things the personal representatives of a man disappear with the generation to which they belong, the intention of the parties to the indenture to create a perpetual rent issuing out of the premises will, if that position can be maintained, be entirely disappointed; and the argument is, in effect, that the law does not permit arrangements by which a rent shall be reserved upon a conveyance in fee, and that where it is attempted the reservation does not affect the title to the land, but the conveyance is absolute and unconditional. The design of the parties to create relations which should survive them, and continue to exist in perpetuity by being annexed to the ownership of the estate of the grantee of the land on the one hand, and of the rent on the other, is manifest from the language of the instrument. They were careful to declare that the obligation to pay the rent should

attach to those who should succeed the grantee as his heirs and assigns, and should run in favor of the heirs and assigns of the grantor; and the nature of a perpetually recurring payment requires that there should be an endless succession of parties to receive and to pay it. We have a legislative declaration, in an act of 1805, passed about ten years after this conveyance, that grants in fee reserving rents had then long been in use in this state (c. 98); and the design of the legislature by that enactment was not only to render such grants thereafter available according to their intention, but to resolve, in favor of such transactions, the doubts which it is recited had been entertained respecting their validity. Still, if, by a stubborn principle of law, a burden in the form of an annual payment cannot be attached to the ownership of land held in fee-simple, or if the right to enforce such payment cannot be made transferable by the party in whom it is vested, effect must be given to the rule, though it may have been unknown to the parties and to the legislature; unless, indeed, the interposition of the latter by the statute which has been mentioned can lawfully operate retrospectively upon the conveyance under consideration.

It is not denied but that by the early common law of England conveyances in all respects like the present would have created the precise rights and obligations claimed by the plaintiff; but it is insisted that the act respecting tenures, called the statute of *quia emptores*, enacted in the eighteenth year of King Edward I., and which has been adopted in this country, rendered such transactions no longer possible. The principles of that statute have, in my opinion, always been the law of this country, as well during its colonial condition as after it became an independent state. A little attention to the pre-existing state of the law will show that this must necessarily have been so. In the early vigor of the feudal system, a tenant in fee could not alienate the feud without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, which consisted in the tenant enfeoffing another to hold of himself by fealty and such services as might be reserved by the act of feoffment. Thus a new tenure was created upon every alienation; and thence there arose a series of lords of the same lands, the first called the chief lords, holding immediately of the sovereign; the next grade holding of them, and so on, each alienation creating another lord and another tenant.

This practice was considered detrimental to the great lords, as it deprived them to a certain extent of the fruits of the tenure, such as escheats, marriages, wardships, and the like, which, when due from the terre-tenants, accrued to the next immediate superior. This was attempted to be remedied by the thirty-second chapter of the Great Charter of Henry III. (A. D. 1225), which declared that no freeman should thenceforth give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him which belonged to the fee: 1 Ruffhead's Statutes at Large, 8. The next important change was the statute of *quia emptores*, enacted in 1290, which, after reciting that "forasmuch as purchasers of lands and tenements (*quia emptores terrarum et tenementorum*) of the fees of great men and other lords had many times entered into their fees to the prejudice of the lords," to be holden of the feoffers, and not of the chief lords, by means of which these chief lords many times lost their escheats, etc., "which thing seemed very hard and extreme unto these lords and other great men," etc., enacted that from henceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffer held before: Id. 122.

The effect of this important enactment was, that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffee before occupied; that is, he held of the same superior lord by the same services, and not of his feoffer. The system of tenures then existing was left untouched, but the progress of expansion under the practice of subinfeudation was arrested. Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation: 1 Kent's Com. 473, and cases cited in note *a* to the fifth ed.; *Bogardus v. Trinity Church*, 4 Paige, 178; and when the first constitution of this state came to be framed, all such parts of the common law of England and of Great Britain, and of the acts of the colonial legislature, as together formed the law of the colony at the breaking out of the revolution, were declared to be the law of the state, subject, of course, to alteration by the legislature: Art. 35. The law as to holding lands, and of

transmitting the title thereto from one subject to another, must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the crown, and as the king was not within the statute *quia emptores*, a certain tenure, which after the act of 12 Car. II., c. 24, abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to 18 Edw. I.: *People v. Van Rensselaer*, 9 N. Y. 334. But, with the exception of the tenure arising upon royal grants, and such as might be created by the king's immediate grantees under express license from the crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the colony, and that it was the law of this state, as well before as after the passage of our act concerning tenures in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the state government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the conquest, before the commencement of the year-books, and long before Littleton wrote his treatise upon tenures.

The fact that the statute we are considering was re-enacted in this state in 1787 has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be re-enacted. The compilation of statutes prepared by Jones and Varick, and enacted by the legislature, embracing the statute of tenures and a great number of other English statutes, was made in pursuance of an act passed in 1786. It cited the constitutional provision which I have mentioned,

and that such of the said statutes "as had been generally supposed to extend to the late colony and to this state," were contained in a great number of volumes, and were conceived in a style and language improper to appear in the statute-books of this state. The persons mentioned were therefore authorized to collect and reduce them into proper form, in order that such of them as were approved might be enacted into laws of this state, to the intent that thereafter none of the statutes of England or Great Britain should be in force here: 1 Jones & Var., c. 35, p. 281. The statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more suitable form certain enactments which it was conceived had the force of law in the colony, and which the constitution had made a part of the law of the state. My views upon this question correspond with those expressed by Mr. Justice Platt, in 18 Johns. 186. The English crown lawyers appear never to have doubted but that the statute was the law of the colonies. Sir John Somers, attorney-general, and afterwards lord-keeper of the great seal in the reign of William III., and who is pronounced by Macaulay to have been, in some respects, the greatest man of his age, together with the solicitor-general, Trevor, gave a written opinion to the king in council, that all the lands in Virginia were held immediately of the crown, and that the escheats and tenure accrued to him, and not to the grantors of the lands. The like opinion was given by Sir Edward Northey, attorney-general to Queen Anne in 1705, in respect to lands in New Jersey. He said that the grantees of the proprietors to whom the duke of York had assigned his patent held of the queen, and not of these proprietors; and in another opinion by the same law officer respecting quit-rents in the colony of New York, he states that no tenure arose upon grants by the duke of York before he came to the crown, he being a subject; but that where the grant was by the crown there was a tenure, "the crown not being within the statute of *quia emptores terrarum*." Chalmer's Colonial Opinions, 142, 144, 149.

These opinions assume that the statute prevailed here to the same extent as in England, and subject to the same exception in favor of royal grants, upon which a tenure always arises. Judge Ruggles, in giving the opinion of the court in *De Peyster v. Michael*, 6 N. Y. 467 [57 Am. Dec. 470], was led to doubt whether the statute was ever in force in the colonies, from finding that several patents issued by the colonial governors

purported to create manors, and to authorize the patentees to grant lands to be holden of the patentees. But if the king could, notwithstanding the statute, license his immediate tenants to create seigniories, as was attempted to be shown by one of the opinions in *People v. Van Rensselaer*, 9 N. Y. 334, and as I am satisfied is the case, these instruments are quite consistent with the idea that the statute was in force in the colony of New York. Assuming this to have been so, our own law in the particular under consideration is, and has at all times since the organization of political society here been, the same as the law of England.

We are then to ascertain the effect of a conveyance in fee reserving rent, upon the assumption that the statute of *quia emptores* applies to such transactions. In the first place, no reversion, in the sense of the law of tenures, is created in favor of the grantor; and as the right to distrain is incident to the reversion, and without one it cannot exist of common right, the relation created by this conveyance did not itself authorize a distress. The fiction of fealty did not exist. The rent in terms reserved was not a rent-service: Lit., secs. 214, 215. It was, however, a valid rent-charge. According to the language of Littleton, "if a man by deed indented at this day maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, etc., such a rent is a rent-charge, because such lands or tenements are charged with such distress by force of the writing only, and not of common right:" Id., secs. 217, 218. And the law is the same where the conveyance is by deed of bargain and sale under the statute of uses: Co. Lit. 143 b. Mr. Hargrave, in his note to this part of the commentaries, expresses the opinion that a proper fee farm rent cannot be reserved upon a conveyance in fee since the statute of *quia emptores*; but he concedes that where a conveyance in fee contains a power to distrain and to re-enter, the rent would be good as a rent-charge: Note 235 to Co. Lit. 143 b. Blackstone says that upon such a conveyance the land is liable to distress, not of common right, but by virtue of the clause in the deed: 2 Bla. Com. 42. The case of *Pluck v. Digges*, 2 Dow. & Cl. 180, much relied on by the defendant, concedes that rent reserved upon a conveyance of the grantor's whole estate may be distrained for by virtue of a clause of distress. That case turned wholly upon a question of pleading. The house of lords held that the Irish statute,

corresponding to the 11 Geo. II., c. 19, sec. 22, allowing a general avowry, did not extend to a rent-charge, but was limited to cases of rent-service, and that the defendant ought in that case to have set out his title. It was for this reason that the judgment in his favor was reversed. Lord Wynford said: "It is a dreadful thing to be obliged, for a defect in form, to give a judgment contrary to the real merits of the case."

These authorities establish the position that upon the conveyance under consideration a valid rent was reserved, available to the grantor by means of the clause of distress. This rent, though not strictly an estate in the land, *Payn v. Beal*, 4 Denio, 405, is nevertheless a hereditament, and in the absence of a valid alienation by the person in whose favor it is reserved, it descends to his heirs. Its nature, in respect to the law of descents, is explained by Lord Coke, who at the same time points out the distinction between such a rent as we are considering and a rent-service reserved upon a feoffment which created a tenure. He says that if a man "seised of a manor, as heir on the part of his mother, before the statute of *quia emptores*, had made a feoffment in fee of parcel, to hold of him by rent and service, albeit they [the services] are newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir on the part of the mother. . . . If a man so seised, that is, by inheritance from his mother, maketh [now] a feoffment in fee, reserving a rent to him and his heirs, this rent shall go to him and his heirs, this rent shall go to the heirs on the part of the father:" Co. Lit. 12 b. The reason is given in a case in Hobart, thus: "If upon a feoffment of lands which I have on the part of the mother, or in borough-English [where the youngest son is the heir], I reserve a rent to me and to my heirs, it shall go to my heirs at common law, for it is not within the custom, but it is a new thing divided from the land itself: *Counden v. Clerke*, cited Id. 31 b; S. C., 1 Eq. Cas. Abr. 213. The distinction is this: A rent-service, such as arose upon an alienation of a fee at common law, was incident to the reversion, and therefore a part of the estate remaining in the feoffer; and upon his death it passed in the same channel of descent as the estate would have done if there had been no alienation.

But where there is no reversion, as in the case of a conveyance in fee since the statute, the rent reserved is an inheritable estate newly created, and descends, according to the general law of inheritance, to the heirs of the person dying seised,

without regard to the heritable quality of the estate, the conveyance of which formed the consideration of the rent. Preston states the principle thus: "A rent incident to the reversion will descend with the reversion as a part thereof; but a rent reserved on a grant in fee, or limited by way of use in a conveyance to uses, will be descendible as a new purchase from the person to whom it is reserved or limited:" 3 Essay on Abstracts of Title, 54. Further on he says that in such cases "the instrument amounts to: 1. A grant of the land from the owner of the same; and 2. A grant of the rent on the part of the grantee:" Id. 55. To the same purpose, see 3 Cru. 313, N. Y. ed. of 1834. The descendible quality of these rents was early established in this state in the case of *Van Rensselaer v. Platner*, 2 Johns. Cas. 17, decided in the year 1800. The action was for nine years' rent to May 1, 1783, reserved upon a grant in fee by the plaintiffs' testator to the testator of the defendants, executed in 1774; and it appeared that the testator of the plaintiffs died on the twenty-second of February, 1783, seven days before the last year's rent sued for became payable. The plaintiffs, however, recovered the rent for the whole period; and the defendants moved in arrest of judgment, on the ground that the recovery embraced one year's rent which did not belong to them as executors, and the judgment was arrested for that reason. Kent, J., said it was clear that the executor could only go for rent due and payable at the testator's death, "where the rent, as in the present case, goes, on the testator's death, to his heirs." There can be no pretense that the court considered the rent to be a rent-service, on the motion that the statute of *quia emptores* had not been enacted in this state when the deed was executed; for in the next case in the book, which was an action for subsequent rent on the same conveyance, and was decided at the same time, it was expressly declared to be "a fee farm rent, or rent-charge." If the annual payments provided for in these conveyances were merely sums in gross secured by personal covenants, the action would have been rightly brought by the executors for the last year's rent, though it fell due after the testator's death. The contract, upon that theory, would have been of the same character as a bond for the payment of moneys by annual installments in perpetuity, in which case, if we can conceive of such a security, the personal representatives of the obligees would have been the proper parties to bring the action, whether the payments sought to be recovered matured before or after the testator's

death. It was only upon the assumption that the right to the rent reserved was a heritable estate, which, so far as it had not become payable at his death, descended to the heirs of the grantor, that the judgment can be sustained. The case was argued by eminent counsel—the late Ambrose Spencer and James Emmot—and appears to have received full consideration; three of the judges delivering opinions. It may therefore be considered an authoritative precedent for the doctrine that rents of the character of these we are considering are heritable estates, descending to the heirs of those in whose favor they are reserved.

But the plaintiff in this case sues as devisee of the grantor, and must establish the position that he is entitled, in that character, to sue upon the covenant. In England, it is perhaps a debatable question at this day whether the assignee of the grantor can maintain the action. In *Brewster v. Kidgill*, 12 Mod. 166, Holt, C. J., said he made no doubt but that the assignee of the rent should have covenant against the grantor, "because," he said, "it is a covenant annexed to the thing granted." It was the case of a rent-charge in fee, granted by the owner of the lands out of which it issued, with a covenant to pay it. In *Milnes v. Branch*, 5 Mau. & Sel. 411, Lord Ellenborough, C. J., stated that he was inclined to think that the language of Lord Holt in this respect was extrajudicial; and putting aside that *dictum*, he said he did not find any authority to warrant the position that such a covenant ran with the rent. There are several other English cases bearing more or less directly upon the question, which it is unnecessary particularly to notice, since they have all been examined by Sir Edward Sugden in a late edition of his treatise on the law of vendors and purchasers. His conclusion is, that there appears to be no foundation for shaking Lord Holt's opinion. The rent-charge, he says, is an incorporeal hereditament, and issues out of the land, and the land is bound by it. The covenant, therefore, he adds, may well run with the rent in the hands of an assignee. The nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal: 2 Sugden on Vendors, W. Brookfield ed. of 1843, p. 482. The great learning of the author (afterwards, as Lord St. Leonards, lord chancellor of England) would incline me to adopt his conclusion, were it not that we have a precedent the other way in this state. In *Van Rensselaer v. Platner*, 2 Johns. Cas. 26, to which I have already briefly alluded, the

plaintiffs made title to the rent under the will of the grantor of the land, and the defendants were the executors of the grantee, the grantor of the rent-charge. It was held, Lansing, C. J., giving the opinion, that the action could not be sustained. The statute 32 Hen. VIII., c. 34, which had been re-enacted in this state, it was said did not apply, as it was limited, as appeared by the preamble, to cases of grants for life or years where there was a reversion; and moreover, by the common law, such covenants did not pass to the assignee of the covenantee.

It was intimated that the difficulty might not have existed if the action had been against the owner of the land charged with the rent, as the assignee of the original grantee, instead of his executors; for, as it was suggested, the common ligament—the estate charged—would have united them in interest as privies. But I do not see that this would have helped the plaintiffs. The defendants, as executors of Platner, the covenantor, were liable to an action upon his express covenant at the suit of any one entitled to prosecute upon it, and if the plaintiffs, the devisees, were entitled to avail themselves of the covenant, they could do so, as it seems to me, against any party chargeable upon it, whether the covenantor himself, his personal representatives, or those who represented him as privies. The question was not whether the defendants were liable to be sued on the express covenant, for they clearly were whether it ran with the land or not. But the doubt was whether the plaintiffs so represented the original covenantee as to be able to sue on the contract made to him; and this depended on the question whether the covenant ran with the rent; and it was held that it did not. It was probably in consequence of this decision that the act of 1805 was passed; and assuming that this case was correctly decided, the present question must turn upon the effect of that statute. It seems to have been considered that at common law the assignee of a reversion expectant upon an estate for life or years could not maintain an action upon the covenants of his lessee, though such covenants ran with his estate. It is so expressly recited in the preamble to the statute 32 Hen. VII., already mentioned, though it was not universally true: *Vyvyan v. Arthur*, 1 Barn. & Cress. 410; 2 Sugden on Vendors, 468. During the reign of that sovereign, the charters and estates of the monasteries, chantries, and other religious houses were, by the coercion of the government, surrendered to the king, or came to

his hands by force of the statutes made for the suppression of these establishments; and the lands were, for the most part, granted by him to individual subjects. The estates being out on terms for life or years, there was, upon the assumption of the preamble, no person in existence by whom an action could be maintained on the covenants in the lease.

After the recital of this matter, the statute proceeds to give an action upon the covenants, not only to the patentees of the king of the estates of the religious houses and their heirs and assigns, but to all others being grantees or assignees of "any other person or persons than the king's highness," and their heirs and assigns. A second section gave the like remedies by the grantees and their assigns against the assignees of the grantors: 2 Stat. at Large, 294. Although the statute was made to meet a special occasion which mainly interested the purchasers of the confiscated property of the church, the language which extended its operation to other grantees of reversions introduced a valuable amendment into the law of property. When the commissioners under our act of 1786 came to report as to the English statutes suitable to be re-enacted, the act respecting the grantees of reversions was selected for that purpose, and was re-enacted in 1788, with certain changes of language—dropping out the reference to the religious houses, and substituting the people of this state for the crown of England—but retaining the words which adapted it to the case of the grantees of private persons: 2 Jones & Var. 184. It stood in this form when the conveyance to Dietz was executed in 1796, and had not then, as I conceive, any operation upon covenants in conveyances in fee. The opinion of Sir Edward Sugden, that such covenants as last mentioned ran with the rent, was not based upon the 32 Hen. VIII. which was admitted to be inapplicable, but upon what was considered the true theory and legal effect of such covenants.

But while Van Rensselaer, the grantor in the indenture under consideration, remained the owner of the rents reserved, and no assignee of those rents had intervened, the act of 1805 was enacted, by which it was declared that all the provisions of the act concerning grantees of reversions, passed in 1788, and the remedies thereby given, should be construed to extend as well to leases in fee reserving rents as to leases for life or years (chapter 98). In the subsequent revision of the statutes, this amendment has been added as an additional section to the substance of the act of 1788: 1 R. L. 364, sec. 3; 1 R. S. 748,

sec. 25. As the revised statutes of 1830 contained the enactment in force when this grantor died, it will be useful to give the precise language of the twenty-third section of the title referred to. It is as follows: "The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies by entry, action, distress, or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor:" 1 R. S. 747.

This provision is, as I have stated, by force of the twenty-fifth section, to extend as well to grants or leases in fee reserving rents as to leases for life or for years. Thus it appears that the grantees of demised lands, and the grantees of rents, and the grantees of the reversion of demised lands, are to have the same remedies which the grantors or lessors would have been entitled to if no change in their title had taken place, and that grants in fee with a reservation of rent are to be considered as within the provision. Reading the language in connection, the enactment in terms is, that the grantee of rents reserved upon grants in fee shall have the same remedy which his grantor had. Applying the statute to this case, the provision is that the plaintiff shall be entitled to the same remedy which Stephen Van Rensselaer, the patroon, would have had if he were alive and were now suing. It is added, "if such reversion had remained in such grantor;" and it is argued that as Mr. Van Rensselaer never had a reversion, the provision does not apply. But it applies in express terms to reservations of rents upon conveyances in fee, and in such cases I concede that there can be no reversion; and it applies equally to rents upon leases for life and for years, where there is a proper reversion. Now, the qualification which alludes to the reversion may well be taken distributively, and be confined to the cases within the provision where a reversion existed, *reddendo singula singulis*. It should be applied, in furtherance of the intention, to the subject-matter to which it appears by the context most properly to relate: 2 Dwarries on Statutes, 617. But independently of this answer, the legislature had the right to consider the interest of a grantor in fee reserving rent as a reversion *pro hac vice*, if it thought proper to do so; though by the general rules

of law it would not be called by that name. The intent to embrace within the purview of the enactment a rent reserved upon a grant in fee is plain and certain; and effect must be given to that intent, though some of the language should seem to be incongruous.

Two positions were taken at the bar to avoid the effect of this statute upon the case. In the first place, it was assumed that before the passage of our statute of tenures, a reversion did arise upon a grant of lands in fee, and that the act of 1805 should be understood as limited to conveyances executed prior to 1787, and as having, therefore, no effect upon the present case. It was in part to furnish an answer to that suggestion that I have taken pains to show that there was never a period in this state when conveyances between individuals created a tenure, except in the special cases of a grant from the crown of a power to erect a manor. But without reference to that principle, I am unable to find anything in the statute which countenances the distinction contended for. The act of 1805, which first brought grants in fee reserving rents within the remedies of 32 Hen. VIII., c. 34, recited, as the motive for the enactment, that such grants had long been in use in this state. The argument supposes that it was intended to give effect to such only as had been executed in colonial times and during the first eleven years of the state government. If such were the intention, it is inconceivable that some idea of the kind was not expressed. The language used certainly conveys the understanding that such transactions had been in use up to the time when the legislature was speaking. I am of opinion that the legislature considered such conveyances lawful contracts, and intended to render them effectual in the hands of those to whom they should be transferred equally as when they belonged to the original parties to whom the rents were reserved, without regard to the time when the grants were made.

The other answer given to the statute is, that these grants in fee were within the protection of the provision of the constitution of the United States which forbids the state governments to pass any law impairing the obligation of contracts. But this statute has no such effect. The parties bound to pay these rents were liable, independently of the statute, to an action at the suit of the grantor of the conveyances, and of his heirs in perpetuity. Upon the failure of heirs, the state would take them as an escheat. If it be admitted that they were not assignable before the statute, so as to give the assignee an ac-

tion in his own name, they were, like other choses in action arising upon contract, assignable in equity; and if the statute had not been passed, the assignee could have prosecuted in the name of the grantor or his heirs for the benefit of the equitable owner. In making them assignable at law and giving the assignee an action in his own name, the legislature acted only upon the remedy, which all the cases agree it was competent for it to do. The same thing in effect was done by the code of procedure in abolishing the distinction between legal and equitable remedies, and requiring all actions to be brought in the name of the real party in interest (sections 69, 111).

There are several precedents of actions of covenant to recover rents of the kind in question, by parties claiming by devise or assignment from the party in whose favor the rent was reserved. *Watts v. Coffin*, 11 Johns. 495 (1814), was an action for rent reserved upon a conveyance of land in fee, brought by the assignee of the grantor, by virtue of several mesne conveyances, against the assignee of the grantee, and a verdict, subject to the opinion of the court, was sustained. *Van Rensselaer v. Bradley*, 3 Denio, 135 [45 Am. Dec. 451] (1846), was a like action for rent on the covenants in a similar conveyance by the devisee of the grantor against an assignee of the grantee, and the plaintiff prevailed. *Van Rensselaer v. Jones*, 5 Id. 449 (1848), was another case of precisely the same character, where the plaintiff had judgment.

Ejectment is a remedy given by statute for the recovery of rent: Stat. 4 Geo. II., c. 28, sec. 2; 2 Jones & Var., Laws of N. Y., 238, sec. 23; 1 K. & R. 134, sec. 23; 1 R. L. 1813, 440, sec. 23; 2 R. S. 505, sec. 30. The statutes prescribe that it may be brought in cases between landlord and tenant, where there is rent in arrear for which no distress can be found, and the landlord has a subsisting right to re-enter. When we consider that, at common law, conditions subsequent could only be reserved for the benefit of the grantor and his heirs, and that a stranger could not take advantage of a breach of them (4 Kent's Com. 127; Lit., sec. 347, and Coke's Com. thereon; *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121), and that the only change which this principle has undergone was that wrought by the act of 1805 and its subsequent re-enactment, the cases in which the devisee or grantee of one who has conveyed in fee, reserving rent with a clause of re-entry, has sustained ejectment for non-payment of that rent, are in point to show the construction which has been given to that act upon

the point under consideration. Such cases have frequently occurred in this state, and many have been reported. In the following cases, the action was prosecuted by the devisee or grantee of the original grantor. It could only be sustained by virtue of the statute, and yet no objection to the plaintiff's title was made. In two of the cases the plaintiff prevailed, and in the others he was defeated upon grounds not material here: *Jackson v. Collins*, 11 Johns. 1 (1814); *Van Rensselaer v. Jewett*, 5 Denio, 121 [51 Am. Dec. 275]; *Van Rensselaer v. Hayes*, Id. 477; *Van Rensselaer v. Snyder*, 13 N. Y. 299, in the court of appeals.

We have come to the conclusion that the covenant of Dietz was one upon which the plaintiff, as the devisee of Van Rensselaer, has a right to sue any one upon whom that covenant was binding. We do not determine whether this would or would not have been so at the common law, but we place the decision upon the effect of the act of 1805, which, in our opinion, precisely meets the case.

The remaining question is, whether the present defendant is liable on that covenant; and here again there has been some controversy in the English courts. In the case of *Brewster v. Kidgill*, before referred to, Lord Holt is supposed to have expressed the opinion that the defendant, who was terre-tenant of land incumbered by a rent-charge in fee, was not liable at law on the covenant, but only in equity: *Brewster v. Kidgill*, 5 Mod. 374; S. C., 12 Id. 166; 1 Salk. 198; 2 Id. 615; 3 Id. 340; Ld. Raym. 317; Carth. 438; Comb. 424, 466; Holt, 175, 669. This case, though reported in a great many books, and often made the subject of reference and comment, does not appear to have been correctly understood. The owner of the land had granted a rent-charge in fee, and there was an indorsement on the back of the deed that the rent was to be paid without any abatement for taxes; and the covenant to pay the rent without deduction was confirmed by another deed executed by the grantor to the grantee several years afterwards. The defendant was in possession of the land under the grantor of the rent, but it did not appear in what character. Afterwards, a parliamentary tax of four shillings on a pound was levied upon the land, and the act declared that tenants might stop the tax out of their rent; but there was a proviso that nothing contained in it should make void any agreements between landlord and tenant. The action was brought to determine whether the defendant could deduct the tax from the rent. It was in form

an action upon a wager, the defendant affirming that he had a right to make the deduction. The determination, according to nearly all the reports, was that the plaintiff was entitled to the whole rent without deduction. So far the case has no application to the point now under consideration.

But a question as to the liability of the defendant, assuming him to have been the assignee of the land, was then started by Chief Justice Holt; and from what he is reported to have said, his authority has been often cited for the doctrine that a covenant for the payment of such a rent does not run with the land so as to bind the assignee. Some of the reports of the case warrant that inference; but the books in which it is more carefully reported show that his distinction was between a provision for a deduction for taxes, which was parcel of the grant of the rent, and a separate covenant providing for such a deduction. The latter, which he considered the case before him to be, he held to be personal, and that it did not affect the assignee of the land. Thus, according to the report in 12 Modern, he said there was another point on which he had not consulted his brethren, which was, whether the defendant was chargeable on the covenant. "If this rent was so granted to be paid," he said, "it would be another matter; but here is only a covenant, and no words amounting to a grant, and therefore, there can be no relief in this case against the terre-tenant but in equity." The reporter adds: "But the other three judges thought this covenant might charge the land, being in the nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken, and reckoned the indorsement a part of the deed. And so judgment was given for the plaintiff." This seems to have been the second time the case was spoken to by the judges. On the first occasion, according to the report in 5 Modern, the distinction between the general covenant to pay the rent and the particular one by which it was agreed not to claim a deduction for the taxes, is apparent from what is stated as the opinion of the court. It is said that the judges "were of the opinion that the plaintiff had no remedy at law upon this covenant [not to deduct the taxes] against the now defendant, for he was only a terre-tenant, and could not be charged as assignee, because the covenant did not run with the land, neither was it annexed to the thing granted [the rent], and therefore he ought to bring an action against the grantor or his heirs; for this covenant does not extend to anything or

parcel of the demise, but to taxes which had not existence at that time, and is for that reason a personal covenant by which the heir may be charged in respect to assets descended, and not otherwise. He might have remedy in equity against the assignee, but not at law," etc.

The report in 1 Lord Raymond, on a careless reading, would seem to convey the idea that the chief justice thought that an action would not lie against the assignee upon the general covenant to pay the rent; but when he illustrates his idea by an example, it is plain that he refers only to the covenant respecting the taxes. He puts the case of an avowry in replevin to try the legality of distress, and a plea in bar of *rien arreter*, and says the avowment could not have replied this covenant against the terre-tenant, but that he could against the grantor and his heirs, to prevent circuity of action. Unless the covenant respecting taxes was the one referred to, the example would be absurd. The original grant, according to the report in Carthew, contained a clause of distress; and the grantee could distrain for the rent granted without regard to the ownership of the land. The meaning of Lord Holt was that the covenant respecting the taxes was a personal arrangement between the grantor and the grantee, which bound them and their heirs, but did not qualify the original covenant annexed to the grant of the rent, and consequently did not affect the assignee or terre-tenant. As the act of parliament allowed the tenant to deduct the tax where there was no agreement to the contrary between the landlord and tenant, and as the covenant respecting taxes was personal between the original parties, the terre-tenant, not being affected by it, could deduct the taxes. But even in this distinction the chief justice was overruled by his brethren, who considered that the particular covenant went "along with the grant." The great authority of Lord Holt appeared to me to make it necessary to explain the real drift of his opinion, though it was a dissenting one; especially as he is often quoted to sustain a doctrine to which he has given no countenance: Platt on Covenants, 65, 475.

Wilmot, C. J., in *Bally v. Wells*, Wilm. 349, is reported to have said that he thought Lord Holt's opinion, which he understood in the sense generally attributed to it, wrong, and that the better opinion was that an assignee of the land in such a case was liable. *Roach v. Wadham*, 6 East, 289, was covenant to recover the arrears of a rent-charge reserved upon a conveyance in fee to uses, and the defendant was sought to

be charged as the assignee of the grantee of the land. The answer made to the action was that the defendant did not take as assignee, but under an appointment created by the original conveyance. It was tacitly assumed by the counsel for the defendant, Mr. Abbott, afterwards the renowned chief justice, and by Lord Ellenborough, C. J., who delivered the opinion of the court, that if the defendant did take as assignee he was liable for the rent; but the effort was to show that his title arose upon the deed of appointment, and it was so held by the court. That so little is found upon the question in the English reports is no doubt owing to the consideration that such reservations are infrequent, and that where they exist the remedy by distress or re-entry has usually proved adequate for the recovery of the rent. The question has been examined by Sir Edward Sugden in his treatise before referred to. He shows that the commissioners appointed to report upon the state of the law of real property have treated the question as a doubtful one. His own conclusion is that such covenants "ought to be held to run in both directions, with the rent or interest carved out of or charged upon it [the land], in the hands of the assignee, so as to enable him to sue upon them, and with the land itself in the hands of the assignee so as to render him liable to be sued upon them:" 2 Sugden on Vendors, 492. There seems to be no distinction favorable to the defendant, between a perpetual rent-charge granted by the owner of an estate, and a like rent reserved by a conveyance in fee by indenture, where the grantee covenants for himself and his assigns to pay it. Littleton places them in the same category, without intimating that there is any legal difference between them: Lit., secs. 217, 218. The covenants cannot be less available where the grantor of the rent received the title by the same instrument by which the rent is created, than if he acquired it by prior title from another person. If there is a difference, the owner of the rent under the former method is entitled to the greater favor; for the constructive notice derived from the record of the grant of the rent would be less likely to come to the actual knowledge of a subsequent purchaser of the land, than if it were contained in the chain of conveyance through which such purchaser would be obliged to trace his title, which would be the case if it were reserved upon a conveyance of the land. If there is any peculiar significance in the term "grant," as some of the judges in *Brewster v. Kidgill*, *supra*, seem to have supposed, it is found in this conveyance.

The defendant's counsel maintains that the burden of covenants like that in question cannot be made to run with the estate of the covenantor in the land, however strongly expressed in the deed, except there be a reversion in the covenantee. The reason is not apparent upon any theory. We can see a plausible though artificial reason why the benefit of such covenants should not pass to the assignee of the covenantee. The latter having transferred his whole estate in the land to the covenantor, no reversion arises; and when he afterwards comes to assign the benefit of the covenants, there is no *vinculum* between him and his assignee upon which a privity of estate can be predicated. It is difficult to say that the transfer in such a case is anything more than the assignment of a chose in action, and it may be, as I have supposed, that it required a statutory authority to give effect at law to the transfer. But there is a certain privity between the grantor and grantee of the land. It is not the privity arising upon tenure, for there is no fiction of fealty annexed. It is, however, the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title given to his vendor; and it is moreover a privity of the same nature with that which obtains between the grantor and grantee of terms for life and years. It is notorious that the grantee of a term is liable upon covenants which are in their nature capable of running with the land, such as covenants to pay rent, to repair, and the like, which his grantor made with the owner of the reversion. In this case there is, it is true, a reversion, and that may be indispensable to enable the covenantee to assign the obligation made to him; but it is not easy to see how, upon any kind of reasoning, the presence or absence of a reversion can affect the relations between the party primarily chargeable upon the covenants and another to whom he conveys the land, charged with the performance of these covenants. It is obvious that the fiction of feudal tenure has nothing to do with the case. In all grants of land by the people of this state the tenure is allodial, and not feudal: 1 R. L. 71, sec. 6; and since 1830 all lands are by statute allodial, and feudal tenures and all their incidents are abolished: 1 R. S. 718, sec. 3. There is a saving as to rents and services already created: *Id.*, sec. 4. If a term should now be created in land held under a patent from the state, or (since 1830) in any land, the lessee covenanting to pay rent and to repair, no one, I suppose, would doubt but that the covenants would run with the land on the one side and with

the reversion on the other; and yet there would be no feudal relation, in fact or in theory, between the parties. If we hold that a feudal tenure is essential to enable the burden of covenants to run with the land, we must decide that there was, prior to 1830, a difference between land, the title to which is derived under a royal grant, and that held under a patent from the state, in respect to the capacity of covenants to run with the land; for as to the former there was a fiction of tenure, while the latter was purely allodial.

I am, moreover, of opinion that the second section of the "act to enable the grantees of reversions to take advantage of the conditions to be performed by the lessees," has an important bearing upon this question. That section gives the assigns of grantees of land the same remedies against the assignees of the grantors which the grantees themselves had against the grantors; and the act of 1805 applies all the provisions of that statute to grants in fee reserving rent. To enable the last-mentioned act to have any operation, the grantees of the reserved rent upon conveyances in fee must be assimilated to the grantees of reversions. The act, in effect, establishes a privity of contract between those holding a derivative title under both grantors and grantees; and the intention of the legislature, apparently, was to place the assignees of both parties upon grants in fee, where a rent was reserved, upon the same footing which was occupied by the assignees of the parties to a lease for life or years, under the statute of Henry VIII., and the re-enactment of it in this country.

The courts of this state have always assumed that the assignees of the grantee, upon leases of this description, were liable for the rent accruing after the assignment, to the grantor and his representatives. *Watts v. Coffin*, 11 Johns. 495, before referred to for another purpose, was covenant against the assignee of the grantee in fee to recover rent. The defense set up was a breach of a covenant of the grantor, but it was not pretended that the defendant was not generally liable. The judgment was for the plaintiff.

Lush v. Druse, 4 Wend. 313, was covenant for rent upon a grant in fee by the executrix of the grantor against the assignee of the lease, and the plaintiff recovered; the questions discussed being whether there was a true description of the premises, and whether the plaintiff was entitled to interest, and some others: but no objection was taken that an assignee was not liable. *Van Rensselaer v. Bradley*, 3 Denio, 135 [45 Am. Dec. 451],

Van Rensselaer v. Jones, 5 Id. 449, *Van Rensselaer v. Gallup*, Id. 454, and *Van Rensselaer v. Roberts*, Id. 470, were all actions for rent on similar grants by the executors of the grantor against the assignees of the grantee. They were defended on other grounds than those now taken. In the case against Gallup, a new trial was ordered because the plaintiff had recovered too much, and in all the others the plaintiff had judgment. *Van Rensselaer v. Jewett*, 2 N. Y. 135 [51 Am. Dec. 275], in this court, was likewise against an assignee of the grantee at the suit of the grantor's executors, to recover rent reserved on a grant in fee. The only question made was in regard to interest; and the judgment for the plaintiff was affirmed. The recent decisions made in the supreme court, after the present defense began to be interposed, have been in favor of the right of recovery; but as they have not been acquiesced in, the cases may be considered as under review upon this appeal: *Main v. Featherers*, 21 Barb. 646; *Van Rensselaer v. Bonesteel*, 24 Id. 365. But the other cases present an uninterrupted course of adjudication, extending through a period of nearly half a century; and in every case where a recovery was had, it was necessarily affirmed that these covenants, as to their burden, run with the estate of the grantee in the land; as those referred to under the preceding head determined that their benefit accompanied the estate of the grantor in the rents. The decisions, moreover, accord with the plainly expressed intention of the parties to the conveyances, and were necessary to enforce the apparent object of the arrangements which they had voluntarily entered into. Their effect as precedents does not depend upon the court having passed upon the validity of the reasoning by which the defense is now sought to be sustained, but upon the universal acquiescence of the tribunals, the legal profession, and the community, in the result of the positions upon which the plaintiff insists. It is the same kind of evidence upon which a large portion of the principles of our system of laws has been established. If it could be satisfactorily shown that the principle thus acquiesced in, and acted upon for so long a time, involved some logical fallacy, or some departure from the true theory of tenures, or from the course of adjudication in the English courts, we should not, in my opinion, be at liberty for such reasons now to change the rule. But if it could be done in any case, we ought to require of the party invoking the change to make it perfectly plain that an error had been committed. But so far as my researches have gone, I have failed to meet

with a single case in which it has been adjudged that the assignee of the estate of the grantee, upon such a conveyance as the one now under consideration, was not liable to the grantor, or those legally representing him, upon the covenants for the payment of rent; and we have seen, moreover, that one of the most eminent of English lawyers and judges, upon a full examination of the question, has formed and published his opinion to the effect that the positions of the defendants are untenable. In determining upon the influence which the course of adjudication in our own courts ought to have upon the judgment we are now to give, we cannot lose sight of the consideration that all parties interested in this species of property have been encouraged to act, and have, beyond all doubt, acted for many years upon the assumption that they were on the one hand entitled to the benefit of, and subject on the other to the burden of, the remedies now sought to be enforced. It is natural that sales and purchases, testamentary provisions for children, settlements upon marriage, trusts for the payment of debts, and the numerous arrangements incident to the ownership of real estate, should have been entered into in the belief that a series of judgments assuming a particular state of the law could be safely confided in.

It was stated upon the argument that the questions which have been discussed were suggested by the decision of this court in the case of *De Peyster v. Michael*, 6 N. Y. 467 [57 Am. Dec. 470]; and the defendant's counsel insisted that his views were sustained by the judgment in that case. The point determined was that a condition in a conveyance in fee reserving rent, providing that the grantee and his assigns should not sell or dispose of the land without first offering it to the grantor, his representatives or assigns, and that upon every sale to another either the seller or purchaser should pay to the grantor, or those representing him, one-fourth part of the purchase-price, was void, as repugnant to the estate granted, and an illegal restraint upon alienation. The action was ejectment to recover the premises, and the plaintiff was defeated. I have attentively examined the reasoning of the learned chief judge who delivered the opinion, in nearly all of which I concur, as I do entirely in the result. I consider the judgment as standing firmly upon the position that a condition to pay a quarter of the value of the land, including all the improvements which might be put upon it upon every alienation, however frequent, which the circumstances of the owner might oblige or incline

him to make, is substantially equivalent to a total restraint upon alienation, and that it is quite repugnant to the nature of a fee-simple estate. The chief judge was careful to distinguish such a restraint upon alienation from the reservation of an annual rent. "Rent," he said, "is separable from the ownership in fee of the land. The reservation of rent does not affect the alienation of the tenant's interest in the land. The reservation of the sale-money restrains and may destroy it." Again, he said: "The covenant of the lessee to pay, which runs with the land, and the lessor's right to re-enter for the non-payment, are practically a sufficient security for the rent." If the reasoning of the opinion gives a somewhat greater effect to the statute of *quia emptores*, and some other acts referred to, than I have attributed to them, it does not affect the conclusion which was arrived at. Indeed, upon the judge's assumption that the statute was not a part of the law of the colony, but took effect in the state only from its enactment by our legislature, it is difficult to say what influence it could have upon the conveyance under consideration in that case, which was executed in 1787, two years prior to the passage of the statute of tenures. There is no retrospect attached to the first section of that act, which is the only one which relates to subinfeudation, or the reserving of a tenure to the grantor upon a conveyance. The remainder of the act is a re-enactment of the material provisions of the 12 Car. II., c. 24, which abolished the military and some other incidents of tenure, and changed all tenures unto free and common socag. The fifth section, adverted to by the chief judge, and relied on in one of the opinions in the supreme court in the present case, is a re-enactment of the material provisions of the fifth section of the act of Charles, and its object was to preserve rents and services certain belonging to socage tenure, and the fealty and distresses incident thereto, which a possible construction of the prior sections, as it was thought, might have taken away. The purpose of the fourteenth section of the act of 1779, 1 Jones & Var. 44, was simply to vest in the state of New York the rights and interests which the crown of Great Britain held in and concerning property in this country prior to the revolution. I cannot see that it has any application to tenure or to conveyances or contracts between individual citizens.

I have not failed to look into the cases cited on the argument from the reports of other states in the Union; but before referring to them, I desire to repeat that as to the right of an

assignee of the rent arising upon conveyances in fee to sue upon the covenants, I put my opinion upon the statute of 1805, and the laws re-enacting it, though it will be seen by the cases yet to be referred to that there is reasonable ground to affirm that such actions could be sustained at common law. Rents reserved on conveyances in fee appear to be in extensive use in Pennsylvania; and many questions respecting them have been considered by their courts. *Philips v. Clarkson*, 3 Yeates, 124 (1800), was an action of covenant for rent by an assignor of the grantor of the land in fee against the original covenantor, and the plaintiff recovered judgment. *Hurst v. Rodney*, 1 Wash. C. C. 375 (1806), was by the covenantee against the grantee of the covenantor. Judge Washington said that the covenant ran with the land so long as it was retained by the defendant. In *Herbaugh v. Zentmyer*, 2 Rawle, 159 (1828), the parties were grantees respectively of the original parties. It was held that the covenant ran with the land, and the position was sustained by a copious reference to English authorities. *Royer v. Ake*, 3 Penr. & W. 461 (1832), was by the grantor of the land against the assignee, by mesne conveyances, of the grantee, and the point was taken that the covenant was merely personal, and did not bind the defendant. The court said it was a covenant which ran with the land, and was binding on the assignee as long as he continued to be assignee. In *St. Mary's Church v. Miles*, 1 Whart. 229 (1836), the plaintiff and defendant were respectively the grantees of the original parties, and the plaintiff recovered; the defense being that the rent was extinguished by not being claimed for thirty years. It was not suggested in any of these cases, which were all upon grants in fee, reserving rent, that the Pennsylvania law of tenures differed from that which prevailed in England; but whenever a question was made as to the covenants passing to the assignees of the original parties, it was answered by English authorities respecting conveyances subject to the statute of *quia emptores*. But in *Ingersoll v. Sergeant*, 1 Whart. 337, decided subsequently to the foregoing cases, it was considered that a rent reserved on a conveyance in fee was a rent-service, and not a rent-charge. The action was replevin to try the legality of a distress in a case in which the landlord had granted a portion of the land charged with the rent in fee, which deprived him of the right to distrain, if it was the case of a rent-charge. It was considered that the statute of *quia emptores* was not a part of the law of that state.

and the position was based upon the charter to Penn, and certain statutes of the state respecting escheats. Without going into this question of local law—though I cannot but think the consequences of the doctrine may be found embarrassing, if generally applied—I am of opinion that the prior cases in this state have established the doctrine of the general availability of these covenants between parties holding derivative titles in a manner not to be shaken by the *dicta* of the last-mentioned case.

The question came before the supreme court of the United States in a case arising in Virginia in 1833. The deed contained the same covenants and clauses of distress and re-entry as the one under consideration. The action was covenant for rent in arrear, and the plaintiff was a grantee of the rent under the original grantor, and the defendant the grantee and covenantor. The opinion of the court was delivered by Judge Story, and his conclusion upon the right of the plaintiff to sue is expressed as follows: "Upon full consideration we are of opinion that the assignee of a fee farm rent, being an estate of inheritance, is, upon the principles of the common law, entitled to sue therefor in his own name. It is an exception from the general rule that choses in action cannot be transferred; and standing upon the ground of being not a mere personal debt, but a perdurable inheritance:" *Scott v. Lunt*, 7 Pet. 606.

It is argued by the defendant's counsel that a reversion in the grantor is essential to enable an obligation to pay rent to attach to any one except the party originally bound to pay it, or to inure to the benefit of any one deriving title from the party in whose favor it was reserved; and the want of a reversion in Van Rensselaer is the circumstance which is supposed to create the difficulty under which the plaintiff labors. But there are several cases in hostility to this doctrine. In *McMurphy v. Minot*, 4 N. H. 251, the plaintiff, tenant for life, demised the premises to the owner of the reversion, reserving an annual rent, which the latter covenanted to pay, and afterwards conveyed the premises to another, under whom the defendant entered. The action was covenant for rent in arrear, and it was urged that the lessee, being seised of the whole estate in fee-simple, his covenant to pay the rent could not be enforced against his grantee; but it was held that a reversion in the plaintiff was not essential, and the plaintiff had judgment. It is settled, by a series of adjudications in England and in this country, that if one possessed of a term for years

demise it, reserving rent, and afterwards assign the rent, the assignee may maintain debt for the rent against the lessee: *Allen v. Bryan*, 5 Barn. & Cress. 512; *Demarest v. Willard*, 8 Cow. 206; *Willard v. Tillman*, 2 Hill (N. Y.), 274; *Childs v. Clark*, 3 Barb. Ch. 52 [49 Am. Dec. 164]; *Kendall v. Carland*, 5 Cush. 74.

The result of the examination which we have given to this case is, that these covenants are available in favor of the plaintiff; and that the defendant, as the owner under Dietz of a portion of the land granted, is liable in this action for a breach of them; and we therefore affirm the judgment of the supreme court.

JOHNSON, C. J., and COMSTOCK, GRAY, and GROVER, JJ., concurred.

SELDEN and STRONG, JJ., delivered opinions in favor of affirming the judgment upon grounds differing, in some respects, from those adopted by the court.

ALLEN, J., being interested in the question, took no part in the decision.

Judgment affirmed.

QUA EMPTORES, STATUTE OF, HOW FAR IN FORCE IN NEW YORK: *De Peyster v. Michael*, 57 Am. Dec. 470.

RENT-CHARGE, HOW CREATED: *Cuthbert v. Kuhn*, 31 Am. Dec. 513.

ASSIGNMENT OF RENT.—Assignee of lessor may, in his own name, maintain an action against the lessee for rents which accrue during the period embraced in the assignment: *Childs v. Clark*, 49 Am. Dec. 164, and note 170, citing the principal case. Assignee of reversion is entitled to rent falling due after the assignment, where there is no reservation of the rent, as rent is incident to the reversion and passes with it: *Martin v. Martin*, 61 Id. 364, and collected cases in note thereto 370, showing that right to rent reserved passes on conveyance of land to grantee: See also *De Peyster v. Michael*, 57 Id. 497.

LEGISLATIVE CONTROL OVER REMEDIES: See note to *Morse v. Gould*, 62 Am. Dec. 112.

CONDITION IN GRANT IN FEE FOR PAYMENT OF RENT, WITH RIGHT OF RE-ENTRY FOR NON-PAYMENT, is not a restraint upon alienation, or in any way repugnant to the estate, and is valid: See note to *De Peyster v. Michael*, 57 Am. Dec. 497.

THE PRINCIPAL CASE WAS CITED in each of the following cases, and to the point stated: A conveyance reserving an annual rent with a clause of distress operates as an assignment, and not as a lease; and leaves no reversion nor possibility of reverter in the grantor. Such rent is a hereditament descendible and divisible forever: *Van Rensselaer v. Dennison*, 35 N. Y. 399; *Lyon v. Adde*, 63 Barb. 96; *Main v. Cooper*, 25 N. Y. 185; *Van Rensselaer v. Reed*, 26 Id. 563; *Tyler v. Heidorn*, 46 Barb. 449. A reservation of rent in

a conveyance gives to the lessor's interest an assignable quantity and makes it, for all purposes of transfer and the rights to enforcement by law, a reversion: *Mais v. Green*, 33 Id. 137. Rent reserved by a conveyance in fee is a rent-charge, and not a rent-service: *Van Rensselaer v. Chadwick*, 22 N. Y. 33; *Tyler v. Heidorn*, 46 Barb. 449. English statutes, passed before the immigration of our ancestors, and applicable to our situation or in amendment of the law, constitute a part of the common law of this country: *Lansing v. Stone*, 14 Abb. Pr. 203; 8 C., 37 Barb. 18. Where there exists a priority of estate between the covenantee and the covenantor, the covenant runs with the land: *Trustees of Columbia College v. Lynch*, 47 How. Pr. 274. If a landlord dies before a rent comes due, it goes to the heir as an incident to the reversion: *Fay v. Holloran*, 35 Barb. 296. A reservation of rent is a lawful condition imposed upon an estate granted: *Caggar v. Lansing*, 64 N. Y. 431. Where, in a conveyance, rent is reserved to the grantor, his heirs and assigns, the devise of the grantor can maintain an action in his own name against the assignee of the grantor in possession for the rent so reserved: *Van Rensselaer v. Barringer*, 39 Id. 14; *Van Rensselaer v. Reed*, 26 Id. 565; *Van Alstine v. McCarty*, 51 Barb. 333. And this is true, notwithstanding the strict relation of landlord and tenant does not exist between them: *Central Bank of Troy v. Heydorn*, 48 N. Y. 263. The following cases were based upon covenants similar to those in the principal case. The same points were raised and decided, and the doctrine laid down in the principal case was affirmed upon its authority: *Cruger v. McLawry*, 41 Id. 221; *Mais v. Green*, 32 Barb. 455; *Van Rensselaer v. Bouton*, 3 Keyes, 261.

SMITH v. NEW YORK AND HARLEM RAILROAD CO.

[19 NEW YORK, 127.]

RULE THAT SERVANT CANNOT RECOVER DAMAGES FROM MASTER FOR NEGLIGENCE OF FELLOW-SERVANT does not apply where the two are employed by different masters; as, where an engineer employed by a company owning and running trains is injured by negligence of a switch-tender employed by a different company owning and leasing the road.

RAILROAD COMPANY'S OBLIGATION TO INTRODUCE IMPROVEMENTS in construction, apparatus, and machinery important to human safety extends in favor of all persons lawfully using its road; it is not limited to passengers holding tickets issued by the company.

APPEAL from a judgment of the New York superior court, in favor of a wife suing as administratrix for damages for negligence causing her husband's death. The facts are stated in the opinions; particularly in that of Selden, J. The decision affirmed is reported in 6 Duer, 225.

Charles W. Sandford, for the appellant.

Ebenezer Seeley, for the respondent.

By Court, GROVER, J. The defendant's counsel insists that this case comes within the rule that a servant cannot recover

for an injury caused by the negligence of a fellow-servant employed by the same master in the same general business. The case of the plaintiff differs from the cases to which this rule has been applied in this important fact: the deceased and switch-tender were not employed by the same master. The former was the servant of the New York and New Haven railroad, and the latter of the defendant. The presumption from the facts of this case is, that the defendant, for a compensation therefor, gave the New York and New Haven company the right of running trains over its track, and agreed to provide switchmen and flagmen to attend upon such trains. The switchmen and flagmen furnished by the defendant for this purpose were in no sense the servants of the New York and New Haven Railroad Company. The defendant would be liable to that company for their negligence. This case does not, therefore, come within any of the adjudged cases establishing the above rule. I think it is not embraced by any of the reasons upon which it is founded. One is to secure vigilance and care by each servant in the discharge of his duty to his employer. Whatever importance may be attached to this is inapplicable to this case. Another is to protect the employer from the great hazards to which he would otherwise be exposed; and still another, that the servant may provide against risks of this character by his contract. This case does not fall within either. The deceased was as much a stranger to the defendant as any passenger in the train run by him, and, I think, entitled equally with them to protection against the negligence of the defendant or its servants.

Another question presented by the exceptions is, whether the defendant is liable to any one except the New York and New Haven Railroad Company, with which the contract was made. In the case of *Thomas v. Winchester*, 6 N. Y. 397 [57 Am. Dec 455], it was held by this court that a dealer in drugs vending poison labeled as harmless medicine was liable to a party who purchased from the innocent vendee, for an injury occasioned by its use. The reasons assigned for the decision apply with equal force to this case. Death, or great bodily harm, is the natural and almost inevitable consequence of negligence in either case. Mischief, like that which actually happened, was to be expected from such negligence. In the case cited, *Rugles, J.*, refers with approbation to the distinction recognized in *Longmeid v. Holliday*, 6 Eng. L. & Eq. 562, between an act of negligence imminently dangerous to life, and one not so;

holding the party guilty liable in the former, to one not contracting with him, for an injury sustained thereby, but not in the latter. In the case last cited, Parke, baron, says: "If a stage-coach proprietor, who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustained serious personal damage, he is liable to him; for it is a misfeasance towards him if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards every one traveling on the road. I think it is a misfeasance in this case towards every one lawfully traveling over the defendant's road to permit any portion of the track to be in a dangerous state. The safety of the public will be promoted by adopting such rule. The consequences of negligence in all cases of this kind require the court to apply the rule adopted in *Thomas v. Winchester*, 6 N. Y. 397 [57 Am. Dec. 455]. That rule holds the party liable for all injuries sustained by any one without fault, which were the probable consequences of his negligence, when such negligence was imminently dangerous to life. Such liability tends to promote caution in these transactions of such vast importance to the public. A contrary rule will induce carelessness and negligence. There was no error in that portion of the charge relating to the duty of the defendant to adopt new improvements, by which the danger of accidents would be materially diminished: *Hegeman v. Western R. R. Co.*, 16 Barb. 353.

The judgment should be affirmed.

SELDEN, J. The accident out of which this case has arisen occurred to a train of cars belonging to the New York and New Haven Railroad Company, while running upon the defendants' road, and was caused by the misplacement of the switch upon the latter road, through the negligence, as the jury have found, of the switch-tender employed by the defendants. The plaintiff's husband, whose death was caused by the accident, was an engineer in the employment of the New York and New Haven Railroad Company; and the defense set up in the answer, and insisted upon at the trial, is that the employees of the New York and Harlem Railroad Company, while engaged in passing the trains of the former company over that portion of the road of the latter which is used for that purpose, are to be regarded as the servants and agents of the New York and New Haven Railroad Company, and hence, according to the settled doctrine that a principal is not responsible to one

servant for an injury caused by the negligence of a fellow-servant, engaged in the same general business, the defendants are not liable.

But it is obvious that this doctrine has no application whatever to the case. The rule applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed. There is no pretense that the deceased was in the employment of the New York and Harlem Railroad Company, against whom this action is brought. If the defendants are right, then both he and the switch-tender whose negligence caused the injury were servants of the New York and New Haven Railroad Company, and not of the defendants. Had the action been against that company, the question as to the applicability of the doctrine referred to might arise, but here it cannot. As between the deceased and the defendants no such relation as that of master and servant existed. The question between them, therefore, is the same as if the deceased had been a passenger upon the train to which the accident occurred, and the defendants can only succeed by showing that the switch-tender was not, at the time of the accident, their servant, in such a sense as to render them responsible to any third person for his negligence.

The act of March 29, 1848, authorizes the New York and New Haven Railroad Company to run their cars upon a section of the defendants' road, upon such terms as may be agreed upon between the two companies. The precise nature of the arrangement made pursuant to this statute does not appear. But it is shown that all the switchmen and flagmen who attended to the trains of the New York and New Haven Railroad Company, upon that section of the defendants' road, were employed by the defendants; from which it is to be inferred that the contract between the two companies was such that the New York and New Haven Railroad Company had nothing to do with the selection and payment of this class of employees. Of course, therefore, as between that company and the defendants, the latter would be responsible for the character and conduct of such employees, who, under such circumstances, must be regarded, as to all intents and purposes, their servants and agents, and not those of the New Haven company, between whom and the employees no privity of contract whatever existed. If, then, there was nothing in the relations of these two companies to prevent the defendants from being liable directly

to the New Haven company for the negligence of this class of agents, much less can they exempt themselves from responsibility to third persons.

The judge, therefore, was clearly right in charging the jury that if the injury was caused by the carelessness of the switch-tender, without negligence on the part of the deceased, the plaintiff was entitled to recover.

It is equally clear that he was right in that portion of the charge which related to the construction of the road. It was satisfactorily proved that if what the witnesses call the frog and guard rail had been used at the place where the train ran off, instead of the short switch, the accident, in all probability, would not have happened. Nearly all the witnesses regarded the former as a valuable improvement upon the short switch, and as adding greatly to the safety and security of the trains. It had been adopted, according to the testimony, previously to the accident, upon nearly all the roads in the country, and had even been substituted, in many places, for the short switch upon the defendants' own road.

It has been held that railroad companies are bound to avail themselves of all new inventions and improvements known to them, which will contribute materially to the safety of their passengers whenever the utility of such improvement has been thoroughly tested and demonstrated: *Hegeman v. Western Railroad Company*, 13 N. Y. 9 [64 Am. Dec. 517]. Undoubtedly, this rule is to be applied with a reasonable regard to the ability of the company and the nature and cost of such improvements; but within its appropriate limits it is a rule of great importance, and one which should be strictly enforced. A stronger case for the application of the rule than is here presented could scarcely arise. The improvement related to a part of the apparatus of the road which is the source of numerous accidents. Its utility was undoubted and the expense trifling. The defendants had themselves recognized its value. If the principle should ever be applied, therefore, it should be applied here. The defendants were clearly in default for permitting the short switch to remain in use upon the road, especially at a place where there was a somewhat unusual complication of switches. The judge was fully warranted, therefore, in submitting this question of negligence to the jury, even if he would not have been authorized to assume, as matter of law, that the company had neglected their duty in this

respect. The language in which this part of the charge was couched was appropriate, and I discover no error in it.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

EMPLOYEE'S LIABILITY TO SERVANT FOR INJURIES TO LATTER RESULTING FROM NEGLIGENCE OR MISCONDUCT OF FELLOW-SERVANT: *Murray v. S. C. R. Co.*, 36 Am. Dec. 268, and extended note thereto 279-290, discussing the question: *Farwell v. Boston & W. R. R. Corporation*, 38 Id. 339, and numerous citations in note to same 346; *Brown v. Maxwell*, 41 Id. 771, and note 773; note to *Gillenwater v. Madison & I. R. R. Co.*, 61 Id. 108; *Fox v. Sandford*, 67 Id. 587; *Cayzer v. Taylor*, 69 Id. 317; *Illinois Cent. R. R. Co. v. Cox*, 71 Id. 298. As to who are fellow-servants in common employment, see extended note to *Fox v. Sandford*, 67 Id. 588-597, explaining the subject.

EXTENT OF RAILROAD COMPANY'S OBLIGATION TO PREVENT ACCIDENTS: See *Pennsylvania R. R. Co. v. Aspell*, 62 Am. Dec. 323; *Noyes v. Smith*, 65 Id. 222; *Nolton v. Western R. R. Corporation*, 69 Id. 628, note, in which it is said that a railroad company's liability for injury to one neither passenger nor employee is governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non laedas*. In such cases there is no relation arising out of any privity of contract.

THE PRINCIPAL CASE WAS CITED in each of the following cases and to the point stated: A stranger is entitled to protection against the negligent acts of another, unless he personally has done or failed to do some act which has aided in producing the injury: *Perry v. Lansing*, 17 Hun, 37; *Young v. New York C. R. R. Co.*, 30 Barb. 229. In case of passengers, railroad companies are bound to avail themselves of all new inventions and improvements known to them, which will contribute materially to the safety of their passengers whenever the utility of such improvements has been thoroughly tested and demonstrated, and the adoption of which is within their power, so as to be reasonably practicable: *Salters v. Delaware & Hudson Canal Co.*, 3 Hun, 340. In fact, their duty to have and use all known improvements in their machinery is not confined to passengers: *Costello v. Syracuse etc. R. R. Co.*, 65 Barb. 106. Passenger carriers must adopt suitable arrangements for the ingress and egress of passengers to prevent accidents, etc.: *Hauman v. Hoboken Land & Improvement Co.*, 2 Daly, 134. The principal case was quoted from in *Swenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 112; distinguished in *Barrett v. Singer Mfg. Co.*, 1 Sweeny, 548, and cited in *Boutwell v. Townsend*, 37 Barb. 207, which gives statutory constructions, distinguishing between contractors for the construction of a railroad and laborers performing the work.

HORTON v. MORGAN.

[19 NEW YORK, 170.]

BROKER EMPLOYED AS MEMBER OF STOCK EXCHANGE TO PURCHASE STOCKS, is, in the absence of a special undertaking, authorized to purchase according to the usages of the board. His principal cannot complain that he took the shares in his own name and mingled them with other shares of the same kind, if such was the custom of brokers at the time and place. So held where there was some evidence that the principal knew the usages in question and did not disapprove them.

APPEAL from a judgment of the New York superior court, dismissing a complaint. The case made on the trial was, substantially, that Horton employed Morgan as a stock-broker, in the city of New York, to buy certain stocks for him; and deposited money as a "margin" to secure him in doing so; and wrote him a series of letters giving directions in language which indicated general familiarity with and assent to brokers' usages in the city. Morgan bought such shares as were ordered; but took them in his own name (or in that of a clerk), and held them mingled with other shares of the same stock; but in so doing he followed the usage of brokers; and he had at all times a sufficient number of shares under his control ready to be made over to Horton on demand. But the shares fell; whereupon Horton repudiated the purchase upon the ground that the shares had not been bought in his name and kept separate for him; and he brought this suit to recover back his margin, together with an additional sum which he had paid as excess of cost of shares over margin, in ignorance, as he claimed, of the manner in which the shares had been bought and held. The judge on the trial dismissed the complaint; and the full bench affirmed his decision (6 Duer. 56). The plaintiff now appealed.

Nicholas Hill, for the appellant.

F. F. Marbury, for the respondent.

By Court, **DENIO, J.** It is unnecessary to pass upon the ruling by which evidence was admitted to show the custom of brokers to sell and hypothecate stock held by them as security on advances; and we do not give any judgment upon that question. There was no evidence that the defendant had ever disposed of the stock which he had purchased for the plaintiff. If the case had been decided by a jury, it may be that we could not say that they were not influenced by this evidence;

but as there was a nonsuit in the case, we ought to look at the facts properly in evidence to ascertain whether the judgment was warranted. The other evidence objected to seems to us to have been properly received. The practice at the stock board, by which the brokers only, and not their customers, are known in their dealings with each other, was not unreasonable; and the plaintiff, by directing this purchase to be made, must be understood as consenting that it should be done in the usual manner. No breach of duty was committed by the defendant, therefore, in making the purchase in his own name. As he was to hold the shares as security for the balance of the purchase-money which he had advanced, it was proper and entirely consistent with the nature of the transaction that he should take the title in his own name. This was necessary, moreover, for his safety; for if default should be made, he would have a right to sell it to reimburse himself, and he would be obliged, in that event, to give a title to the purchaser from him; and we do not see anything unlawful in his transferring it to his clerks, if it remained under his control, and if he was ready, when called on by the plaintiff, to transfer it to him upon the advance being paid. We suppose it would have been his duty to have procured transfers to the plaintiff, if the transfer office had remained in New York, when the plaintiff paid the balance of the price; but the failure of the company, and the removal of the office, excused him from the performance of that act. We can see nothing, therefore, in the conduct of the defendant to render him liable to the plaintiff for the money which the latter had chosen to invest in his stock.

The plaintiff had no interest in having his shares kept separate from the mass of the defendant's stock. One share was precisely equal in value to every other share. Chancellor Kent, said, in a case precisely similar in principle, that it was sufficient if the defendant always had the requisite quantity of shares on hand, and that the law would presume that the shares so on hand from time to time were the shares deposited, because the parties had not reduced them to any more certainty: *Nourse v. Prime*, 4 Johns. 490 [8 Am. Dec. 606]; S. C., 7 Id. 69 [11 Am. Dec. 403].

The judgment of the superior court must be affirmed.

All the judges concurred.

Judgment affirmed.

THE DOCTRINES OF THE PRINCIPAL CASE were approved and followed in *Clark v. Meigs*, 13 Abb. Pr. 468; S. C., 22 How. Pr. 341; *Rogers v. Gould*, 6 Hun, 229; *Marston v. Gould*, 69 N. Y. 226; *Markham v. Jaudon*, 41 Id. 243, so far as to uphold the doctrine that a broker is not bound to keep the same identical shares purchased for his client, if he has always on hand or under his control a sufficient number of shares, in his own name, or under his control, to respond to the call of the customer. In other words, upholding the custom of brokers. A client dealing with stock-brokers is governed by the customs of that species of business: *Peckham v. Ketchum*, 5 Bosw. 511; *Wicks v. Hatch*, 62 N. Y. 540. The broker may take title in his own name: *Markham v. Jaudon*, *supra*. A broker who is employed as such to purchase and carry stock or other securities has a right to retain the securities as margin: *Wicks v. Hatch*, 6 Jones & S. 111.

DUTY OF STOCK BROKER TO HIS CLIENT.—1. LEGAL RELATION OF BROKER TO CLIENT, where the former with his own money purchases or sells stocks for the latter for purposes of speculation. The business of buying and selling stocks and other securities in the United States is generally transacted by brokers for a commission agreed upon or regulated by the usages of the place where stocks are bought and sold; and this business is generally restricted to those brokers who are members of stock exchanges, there being one of these bodies in several of the principal cities of the United States. An ordinary transaction between a broker and his client in a stock speculation may be thus described: "The customer employs the broker to buy certain stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent of their market value, and agrees to keep good such proportionate advance according to the fluctuations of the market. The broker undertakes and agrees: 1. At once to buy for the customer the stocks indicated; 2. To advance all the money required for the purchase beyond the ten per cent furnished by the customer; 3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent is kept good, or until notice is given by either party that the transaction must be closed—an appreciation in the value of the stocks is the gain of the customer, and not of the broker; 4. At all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract, the customer undertakes: 1. To pay a margin of ten per cent on the current market value of the shares; 2. To keep good such margin according to the fluctuations of the market; 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker:" *Markham v. Jaudon*, 41 N. Y. 239, *per* Hunt, C. J. A more detailed history of an ordinary transaction between a client and broker is given by Dos Passos in his masterly work on stock-brokers and stock exchanges, p. 104. "The ordinary margin," says he, "paid on opening an account with a broker, that is, in ordering him to buy or sell securities, is ten per cent. The margin may be less than this, or frequently none is advanced, according to the confidence which the broker has in the ability of the client to respond to ultimate loss. But whether the broker advances all or only the principal portion of the sum invested in the securities, the relation of the parties is unchanged.

The fact exists that the broker looks to the principal for an indemnity upon the entire transaction. The client having given the broker an order to buy or sell, either in writing or verbally, the next step in the transaction is that the broker goes into the stock exchange and executes the business, making a verbal contract therefor with another broker. Frequently the broker, upon receiving an order, deposes another or subordinate broker to do the business. This is contrary to the general principle of law that an agent cannot delegate his business to another—“*Delegata potestas non potest delegari*,” but it is justified by the general usage of Wall street, of which the client has express or implied knowledge. The exact transaction in the stock exchange is as follows: The selling broker offers for sale his securities, and if there is a broker present who wishes to purchase, the contract is completed upon his assenting to the terms mentioned.” The stock exchanges have rules and regulations which give still further minute details concerning stock transactions, but they are too voluminous to be embodied in this note. Clear and explicit information as to the *minutia* of such transactions will be found in the work above alluded to. Brokers, in making transactions with one another, do not know for whom they are made, the names of the principals being jealously concealed. The result is, that one broker looks to the other contracting broker to carry out the transaction, and in practice there is no attempt made to enforce any liability against the principal should he become known. There is no written contract, as a general rule, between the brokers, each one merely dotting down the transaction made, and reporting it to his office, at which place, later in the day, the business is confirmed by comparisons made by each side. On the following day, if the transaction is made “regular,” the stocks are duly delivered at the office of the purchasing broker by the selling broker, who receives payment for them. If the sale be made on time, the transaction is completed when the time-expires. The stock, when received, remains in the office of the purchasing broker to await the further orders of the client. Sometimes the stock is held by the broker with merely a general power of attorney in blank attached to or indorsed upon it. The stock is sometimes transferred on the books of the company in the name of the broker, but rarely in the name of the principal. This stock is considered as the client’s, subject only to the lien of the broker for advances and commissions. The broker collects the dividends, and pays assessments upon it, if any be levied, and the same remains in his hands through the whole transaction until it is sold, the client never having possession of, and rarely ever seeing, the stock. Upon the purchase of the stock, it is necessary for the broker to send a notice to his client, giving the price and the name of the broker from whom he has purchased; and unless he does this, his negligence will preclude him from recovering his commissions. During the time the stock or securities remain in the possession of the broker, he uses them to raise money with which to carry on his business, and no attempt is made to keep the stocks separate, or to keep the identical certificates on hand, the client usually being satisfied if the broker is able to deliver the number of shares purchased, without any regard to particular certificates: Dos Passos on Stock-brokers and Stock Exchanges, 106-108. It is evident that there is a technical distinction between the transactions of a stock-broker, as recited above in the language of Dos Passos, and the transactions of an ordinary broker.

This distinction is thus tersely summarized by Woodruff, J., in his dissenting opinion in *Markham v. Jaudon*, 41 N. Y. 256: “In the first place, the stock-dealer who is employed, though called a stock-broker, does not act as broker in this transaction. It is no part of the office or duty of a broker

to pay the price. It is no part of the office or right of a broker to receive the property, still less to take the title to his own name. In this transaction he acts in a peculiar business, in his own name and on his own responsibility, protected against loss by the indemnity furnished, or by the agreement to be furnished, to him. The idea of mere agency, ordinarily suggested by the name 'broker,' does not therefore arise out of the fact that the dealers in stocks for account of others, as to profit and loss, are called stock-brokers. In the next place, the transaction, according to the intent and purpose of the employment of the broker, does not contemplate that the customer will ever receive the stock or own it. It may be that if the broker desires to close his connection with the transaction, the customer, if he pays the cost, interest, and all commissions which the broker has earned, or is entitled to earn, will receive the stock. Whether he may so insist or not is a collateral question; and if he be so entitled, it will nevertheless be true that this is not in pursuance of the original arrangement, but a departure from it; for the intent is that the stock shall be carried by the broker until directed to be sold, the customer never having the title to the stock at all. And finally, in my opinion, the transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means or credit, accounting to his customer for the profits, if any, and holding him responsible for the loss." This distinction was also adverted to in *White v. Brownell*, 3 Abb. Pr., N. S., 326, per Van Vorst, J., where it was said that a broker is an agent simply. He transacts business not for himself, but for another. He is a middle-man, a negotiator between other persons for a compensation. A stock-broker deals in stocks of moneyed corporations, and other securities, for his principal. It is a calling of great responsibilities, in which punctuality, honesty, and knowledge are required. In *Wood v. Hayes*, 15 Gray, 375, it was held that where a stock-broker advances his own money in the purchase of stocks for another, and holds the shares in his own name, the transaction stands on the footing of contract, which is strictly conditional to deliver so many shares on payment of so much money. But notwithstanding these technical differences, the courts have a decided inclination to visit a stock-broker with all the responsibilities of a broker and pledgee, and to confer upon him all of the advantages of those relations. This law seems to be established by the following cases: *Markham v. Jaudon*, 41 N. Y. 235; S. C., 40 How. Pr. 366; *McNeil v. Tenth National Bank*, 46 N. Y. 325; S. C., 55 Barb. 59; *Baker v. Drake*, 53 N. Y. 211; *Stenton v. Jerome*, 54 Id. 480; *Tausig v. Hart*, 58 Id. 425; *Baker v. Drake*, 66 Id. 518; *Gruman v. Smith*, 81 Id. 25; *Brass v. Worth*, 40 Barb. 648; *Clarke v. Meigs*, 22 How. Pr. 340; *Read v. Lambert*, 10 Abb. Pr., N. S., 428; *Andrews v. Clerke*, 3 Bosw. 590; *Taylor v. Ketchum*, 5 Robt. 507; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Gilpin v. Howell*, 5 Pa. St. 41; S. C., 45 Am. Dec. 720; *Kenfield v. Latham*, 2 Cal. Leg. Rec. 235; *Child v. Hugg*, 41 Cal. 519; *Thompson v. Toland*, 48 Id. 99.

A contrary doctrine appears in *Hanks v. Drake*, 49 Barb. 186; *Sterling v. Jaudon*, 48 Id. 459; *Schepler v. Eimer*, 3 Daly, 11; but it will be observed that the late New York court of appeals cases given above overrule these conflicting cases on the point under consideration. The theory that the relation which exists between a stock-broker and his client in an ordinary speculative transaction is not that of pledgor and pledgee, is mainly based upon the argument of inconvenience. It is said that as stocks are a fluctuating species of property, whose value is liable to be wiped out in a moment, the burden should not be put upon a broker to give his client notice of a decline

or rise, as the case may be, and to make a demand for further margins. But this argument is just as forcible when applied to the undisputed case of a pure pledge, where it is conceded that there must be notice to the pledgor before a sale can be made, as where the owner of stocks pledges them to secure borrowed money. In this instance, although the stocks are liable to decline, and leave the lender without security, it is clear that in the absence of any express agreement they could not be sold without legal notice: *Markham v. Jaudon*, 41 N. Y. 244. So where the client deposits stock, etc., instead of money, as a margin, it has been held that the relation of pledgor and pledgee exists: *Lawrence v. Maxwell*, 53 Id. 19; *Vaupell v. Woodward*, 2 Sandf. Ch. 143. There is no law, however, to prevent the broker from protecting himself against the fluctuations of an advance or decline in the market by exacting sufficient margins at the outset to meet the contingencies of speculation; and if he neglect to do this, he should not expect the law to aid him; and he may further insure himself by making a special contract with his client, which will enable him to dispose of securities in any manner and at any time that may be agreed upon without notice, and the law will uphold and carry out such contracts: *Ritter v. Cushman*, 7 Robt. 298; *Taylor v. Ketchum*, 5 Id. 513; *Markham v. Jaudon*, 41 N. Y. 244. "Upon the whole, while it must be conceded that there are incongruous features in the relation, there seems to be no hardship in holding that a stock-broker is a pledgee; for although it is true that he may advance all or the greater part of the money embraced in the speculation, if he acts honestly, faithfully, and prudently, the entire risk is upon the client, and may be enforced against him as a personal liability, irrespective of the value of the securities which are the subject of the transaction. The stock-broker is a broker because he has no interest in the transaction, except to the extent of his commission; he is a pledgee in that he holds the stock, etc., as security for the repayment of the money he advances in its purchase; so he is a trustee, for the law charges him with the utmost honesty and good faith in his transactions, and whatever benefit arises therefrom inures to the *cestui que trust*." Dos Passos on Stock-brokers and Stock Exchanges, 102, 114.

2. PURCHASE ON "LONG" ACCOUNT.—a. *Order to Purchase, Price, Number of Shares to be Bought, etc.*—It is a duty imposed by law that when a broker or agent is directed to buy at a fixed price he must buy at that price, and no other. So an order to buy stocks "regular" would not be fulfilled by the broker's purchase at "seller's option, thirty days:" *Taussig v. Hart*, 58 N. Y. 423. And an order to a broker to buy five hundred shares of stock, buyer's option in sixty days, at two dollars per share, will not be fulfilled by the broker's buying the same at one dollar and sixty-two and one half cents per share at thirty days, buyer's option, and then charging one dollar and seventy-five cents, sixty days. The client is not liable, therefore, in such a case, though he give his note without knowledge of the facts: *Day v. Holmes*, 103 Mass. 308. If the broker is merely directed to buy, without any price being designated, he can make the purchase at the market price; but he is, of course, restricted to the order as to the amount or number of shares he may buy: Dos Passos on Stock-brokers and Stock Exchanges, 119. An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is, however, not an entire contract. So if the broker cannot purchase the whole amount stated, he may purchase a less number of shares. His undertaking is not to deliver the whole absolutely, but to buy as much stock or as many securities as he can obtain in the regular way, below or at the limit fixed, unless there is something in the circumstances surrounding the transaction to show that the client regards the

purchase of the whole number of shares as essential to the value of a part: *Marye v. Strouse*, 5 Fed. Rep. 486. The broker is justified in acting according to the course of trade and the regular usage of business of the place where stock is to be purchased: *Rosenstock v. Tormey*, 32 Md. 178; S. C., 3 Am. Rep. 125. The broker's authority to buy shares may be revoked at any time before he has acted upon it; and money put up to enable him to pay for the shares may be demanded back: *Fletcher v. Marshall*, 15 Mee. & W. 761. This, however, cannot be done after the broker has entered into a contract for purchase and become personally responsible for its performance: *McEwen v. Woods*, 11 Q. B. 13; *Sutton v. Tatham*, 10 Ad. & El. 27. Where a broker is directed to buy at a particular price, or at the market price, his duty in each case is to act diligently and prudently and in entire good faith: See cases subsequently cited to this point. It is a broker's duty to give his client the fullest information concerning his transactions and dealings in relation to the property alleged to have been bought or sold. He must not conceal such information, and if he does, the client in an action, brought to recover alleged profits or to adjust unsettled accounts, should be accorded a full right of examination before trial. It is also a broker's duty to exercise his best judgment and discretion for his client's benefit: *Gray v. Haig*, 20 Beav. 219.

b. *Broker's Duty and Liability in Purchasing—Right to Indemnity.*—It is the broker's duty to buy the kind of stock or securities which his client requests him to buy; and if he exercises prudence and care in so doing, he will not be liable, although the securities purchased by him for his client in the regular course of business prove spurious. Reasonable diligence and care only are required of a factor or broker in his employment. The known usages of trade and business enter into such employment; and if he conducts his business according to such usages, he will be exonerated from all responsibility: *Loeb v. Hellman*, 83 N. Y. 601; *Phillips v. Moir*, 69 Ill. 155; *Deahler v. Beers*, 32 Id. 368; *Bayliffe v. Butterworth*, 1 Exch. 425; *Webb v. Challoner*, 2 Fost. & Fin. 120; *McEwen v. Woods*, 11 Q. B. 13; *Sutton v. Tatham*, 10 Ad. & El. 27; *Whitehead v. Izod*, 2 L. R. C. P. 228; *Biederman*, Id. 504; *Smith v. Lindo*, 5 Com. B., N. S., 587; *Rosewarne v. Billing*, 15 Id. 316; *Remfry v. Butler*, 1 El. B. & E. 887; *Inchbald v. Neigherry Coffee Co.*, 34 L. J., N. S., C. P., 15; *Taylor v. Stray*, 2 C. B., N. S., 175; *Hunt v. Gunn*, 15 Id. 226; *Bayley v. Wilkins*, 7 Com. B. 886; *Pollock v. Stables*, 12 Q. B. 765; *Morrice v. Hunter*, 14 L. T. R., N. S., 897; *Gheen v. Johnson*, 90 Pa. St. 38. That the broker is not liable though the securities purchased be spurious, see, particularly, *Lambert v. Heath*, 15 Mee. & W. 486; *Westropp v. Solomon*, 8 Com. B. 345; *Young v. Cole*, 3 Bing. N. C. 724; *Peckham v. Ketchum*, 5 Bosw. 506; S. C., 10 Abb. Pr. 220. In the purchase of stocks, there seems to be no distinction between the employment of a stock-broker and any other kind of an agent. In the case last cited, the court held that the employment of the defendants, stock-brokers, could not be justly treated as an employment to purchase genuine stock to the extent and import of making them guarantors of the validity of that which they should purchase; it was rather to purchase what in the market was passing as stock of this description, and that an agent employed to purchase a commodity of a particular character or quality is only bound to use all the circumspection and diligence which a prudent purchaser himself would exercise. From the cases already cited in this subdivision, another rule is obtained, where the broker acts in pursuance of his authority, in good faith, with prudence, and in accordance with the usages of the stock exchange or his fellow-brokers. And this rule is that the broker, when so acting, is entitled to a full indemnification for any losses which may

occur in the transaction of the business: See also *Lee v. Garguilo*, 13 Jones & S. 595; *Hawkins v. Malby*, L. R. 6 Eq. 505; S. C., 4 Ch. App. 200; *Emmerson's Case*, L. R. 1 Ch. App. 433; *Marten v. Gibbon*, 33 L. T. R. 561; *Whitehead v. Izod*, L. R. 2 C. P. 228. In *Duncan v. Hill*, L. R. 8 Exch. 248, reversing L. R. 6 Exch. 255, the court said, in alluding to the right of a stock-broker to receive indemnity for acts performed in transacting the business of his clients according to the rules of the stock exchange: "It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect." But where the agent is subjected to loss, not by reason of his having entered into the contracts which he was authorized to enter into by his principal, but by reason of a default of his own, such as insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be employed on the part of his principal to indemnify him: *Id.* Neither can a stock-broker recover where he acts beyond the scope of his authority: *Bowlby v. Bell*, 3 Com. B. 284; *Fletcher v. Marshall*, 15 Mee. & W. 755. Nor can he bind his client by anything done under a rule of the stock exchange which was not made until after the client gave the broker his instructions: *Westropp v. Solomon*, 8 Com. B. 345. It is also a broker's duty not to incur any expense on the principal's behalf which the broker can avoid: *Clegg v. Townshend*, 16 L. T. R., N. S., 180. And a custom of charging customers an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should appear that both parties knew of it: *Marye v. Strouse*, 5 Fed. Rep. 483. It is also the broker's duty to exercise due diligence and ordinary skill in the management of his client's business, such as giving notice of each transaction in stocks according to the usages of brokers, etc. If he fails to do this, he will be precluded from recovering his commissions: *Hoffman v. Livingstone*, 14 Jones & S. 552; see, generally, *Speyer v. Colgate*, 4 Hun, 662.

c. *Not Necessary for Broker to Keep Identical Stock Purchased—Disposition and Safe-keeping of Securities, Generally, after Purchase by Broker.*—After stock has been purchased and paid for by a broker, he may have the stock transferred to his own name, or to that of his clerk, so as to secure himself for the amount of the advances made by him; but this does not deprive the client of the privilege to vote upon the stock, as it is well settled that pledgors of stock are entitled to vote upon it: *Strong v. Smith*, 15 Hun, 225; *Merchants' Bank v. Cook*, 4 Pick. 405; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Matter of Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 402. It is the duty of a broker to use ordinary diligence and care in keeping his client's securities; and if in the exercise of all proper precautions they are stolen or lost, he will not be liable: *Abbett v. Frederick*, 56 How. Pr. 68; *Third Nat. Bank v. Boyd*, 44 Md. 47; S. C., 22 Am. Rep. 35; *Jenkins v. National etc. Bank*, 58 Me. 275; *Dearborn v. Union Nat. Bank*, *Id.* 273; S. C., 61 *Id.* 369. But it has been held that a corporation is liable for stocks and bonds deposited with it as collateral security for a loan, and which have been abstracted and misappropriated by one of its officers having full control of the affairs and funds of the corporation, and where the conduct of such officer was not properly looked after by the trustees: *Cutting v. Marlor*, 78

N. Y. 454. And this principle has been applied to the case of stock-brokers who receive stocks of their clients as collateral or otherwise, and fraudulently or negligently allow them to be lost or misappropriated. Thus, where a firm of stock-brokers receive or hold money for their clients, and an individual member converts or misapplies such money, the other partners are still liable to the clients, although they had no knowledge of the misappropriation or conversion: *Butler v. Finck*, 21 Hun, 210; *Sadler v. Lee*, 6 Beav. 324; *La Marquise De Ribeyre v. Barclay*, 23 Id. 107; *Stone v. Marsh*, 6 Barn. & Cress. 551. A broker, however, who acts in good faith, and according to the usages of stock-brokers, is not liable for the loss of margins caused by the insolvency of his fellow-broker, with whom he has deposited such margins: *Gheen v. Jackson*, 90 Pa. St. 38. And it is no violation of the broker's duty to use his client's securities left with him on margin. The securities, it is true, are the client's, but, on the other hand, the money of the broker has paid for them. The relation between the broker and client, we have seen, is that of pledgor and pledgee; and on the ground that the pledgee has the right to use pledged property, unless prohibited by agreement or by the nature of the thing pledged, it seems to be the better opinion that a broker may use his client's securities, accounting to the client for the benefits or profits, less the amount properly expended in conducting his stock transactions. The outgrowth of this doctrine is the rule laid down in the principal case, that a broker holding stocks for his client on margin for speculation is not bound to keep on hand the identical shares purchased. The duties of his employment are fully complied with by having ready for delivery, or under his control, shares of the same description and amount as those purchased for his client, when called for by the latter. Shares of stock have no "ear-mark;" and as one share is equal to every other share of the same stock, the broker is not bound to deliver, or to have on hand for delivery, any particular shares, or the identical shares purchased for his client. The above propositions are borne out by the following cases: *Boylan v. Huguet*, 8 Nev. 345; *Salters v. Genin*, 7 Abb. Pr. 193; S. C., 3 Bosw. 250; *Ledy v. Loeb*, 85 N. Y. 365; *Lawrence v. Maxwell*, 58 Barb. 511; S. C., 6 Lans. 469; 53 N. Y. 19; *Tausig v. Hart*, 58 Id. 425; *Thompson v. Toland*, 48 Cal. 99; *Wynkop v. Seal*, 64 Pa. St. 365; *Wood v. Hayes*, 15 Gray, 375; *Atkins v. Gamble*, 42 Cal. 86; S. C., 10 Am. Rep. 407; *Hawley v. Brumagin*, 33 Id. 394; *Berlin v. Eddy*, 33 Mo. 426; *Worthington v. Tormey*, 34 Md. 193; *Le Croy v. Eastman*, 10 Mod. 499; *Mocatta v. Bell*, 27 L. J., N. S., Ch. 240; *Nourse v. Prime*, 4 Johns. Ch. 489; S. C., 8 Am. Dec. 606; S. C., 7 Id. 69; 11 Am. Dec. 403; *Gilpin v. Howell*, 5 Pa. St. 41; S. C., 45 Am. Dec. 720.

The following cases also show that a stock-broker who has purchased stock for a client or customer fulfills his obligations by keeping at all times on hand, or under his control, ready for delivery to his customer, upon his paying the sum due him thereon, either the particular shares purchased, or an equal amount of other shares of the same kind. The principal case is also cited in each of them, or in the notes thereto, to the point stated: See *Stewart v. Drake*, 46 N. Y. 453; *Price v. Gover*, 40 Md. 112; *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178; *Marston v. Gould*, 69 N. Y. 226; *Rogers v. Gould*, 6 Hun, 229. See also, in this connection, *Langton v. Waite*, L. R. 6 Eq. 165; *Clarke v. Meigs*, 13 Abb. Pr. 467; S. C., 22 How. Pr. 340, reversing the same case, 12 Abb. Pr. 267, and 21 How. Pr. 187. *Taylor v. Keichum*, 5 Robt. 507, S. C., 35 How. Pr. 289, was also overruled by the above authorities. So where government bonds are purchased for a client, the identical bonds need not be retained, unless there is some special agreement to the

contrary: *Levy v. Loeb*, 85 N. Y. 565; and where securities are deposited with a stock-broker for the purpose of his advancing money upon them, he has an implied authority to pledge such securities to some other person for that purpose: *Mocatta v. Bell*, 27 L. J., N. S., Ch. 240. But where a client employs a stock-broker to sell a certain number of shares for him, and the specified quantity is delivered for that purpose, the broker is responsible if he transfers the shares to a third person, and the client may treat such transfer as a sale of his stock. As an agent of the owner, he violates his duty if he does anything else with the stock than to sell it. And evidence of a custom among brokers to make such a transfer is inadmissible in defense of such a transaction: *Parsons v. Martin*, 11 Gray, 111. It is the stock-broker's duty to have at all times on hand, or under his control, stock sufficient as to number of shares or quantity to make good his client's purchases, when the latter shall pay the amount due thereon. He can claim to have fulfilled his contract only so long as he has on hand shares similar in kind, etc., to those which he has purchased for his client; and if he denudes himself of the power to fill his customer's order, he is guilty of a conversion, and the client may assume that the sale by which the broker dispossessed himself of the stock was made for his benefit, and recover the price of the shares on the day the sale was made: *Langton v. Waite*, 6 L. R. Eq. 165. While a stock broker is not bound to keep on hand the identical securities purchased, yet a duty to keep them may be imposed upon him by agreement. Thus, if the parties agree that the original bonds shall be carried, the broker must keep them on hand in the identical shape in which they were purchased. So if the broker sells or disposes of the bonds in breach of such agreement, his client will not be liable to him for any loss arising upon a sale of other bonds substituted for the original, although the broker shows that he had constantly on hand, during the relation, other bonds sufficient to meet the demands of his client. The broker must show that he has substantially performed all the conditions precedent embraced in the contract before he can recover in such a case: *Levy v. Loeb*, 85 N. Y. 365; *Hardy v. Jaudon*, 1 Robt. 261; S. C. affirmed, 41 N. Y. 619, note. Further, it is the duty of a pledgee to restore the same kind of stock pledged with him, where there are two different kinds in the corporation. Thus a pledge of fifty shares of "consolidated" stock cannot be restored by assigning to the pledgor fifty shares of "converted" stock. The identical kind pledged must be restored: *Wilson v. Little*, 2 N. Y. 448, 449.

d. "Calls," or Assessments, Dividends, Interest, Profits, etc.—As stock, when purchased, becomes the property of the client, it follows that all benefits in the way of accretions, interests, dividends, or profits resulting therefrom belong to the latter: *Gruman v. Smith*, 81 N. Y. 25, reversing 12 Jones & S. 389; *Markham v. Jaudon*, 41 N. Y. 235; *Hasbrouck v. Vandervoort*, 4 Sandf. 74. So all profits or benefits of any description which the stock-broker derives from the loan or use of his client's securities, would, under this rule, and in the absence of agreement, belong to the client. But it has been held that it is not only the right but the duty of the pledgee of stock to collect all dividends accruing whilst the stock remains in his hands. The fact that no transfer has been made on the books of the company from whom the pledgor collects the dividends is immaterial. And this rule allowing the dividends to the pledgee is right, because he has a right to have the stock transferred into his own name upon the books of the company. If, therefore, the pledgor of stock receives the dividends from the company, the pledgee may maintain an action against him to recover the same: *Gaty v. Holliday*, 8 Mo. App. 118.

Where a bond with interest coupons attached is the subject of the pledge, the pledgee has an implied authority to collect the interest thereon: *Andros-coggin R. R. Co. v. Auburn Bank*, 48 Me. 335. The client is subjected, however, on the other hand, to all of the responsibilities of ownership, and is liable for all "calls" or assessments of any kind made upon the stock while he is the owner thereof, although the broker may have paid them in the first instance, by reason of the stock being transferred on the books into his own name, in accordance with the usages of the business: *McCalla v. Clark*, 55 Ga. 53. So a pledgee of stock who has transferred the same on the books of the company is subject to all of the liabilities of a stockholder: *Pullman v. Upton*, 96 U. S. 328; *National Bank v. Case*, 99 Id. 628; *Wheelock v. Kost*, 77 Ill. 296.

3. DUTY OF BROKER TO SELL—"STOP-ORDER."—It is a stock-broker's duty, when directed to sell stock, to comply with the client's instructions to sell. His duty is to sell at the price named, or at the market, if that be the order, and to faithfully and rigidly carry out directions in respect to time, price, number of shares, manner, and place. The broker's duty in selling is governed by the same general rule that controls in the case of an order to purchase, and he must exercise skill, prudence, and caution in making sales of stock for his customer: *Tausseing v. Hart*, 58 N. Y. 425; *Pulajfer v. Shepard*, 36 Ill. 513; *Jones v. Marks*, 40 Id. 313. Evidence, however, is admissible to show that a written order to sell stock at a designated figure was subsequently modified by an oral understanding for delay as to time, on the ground that the agreement did not contradict the written power to sell at the price named: *Clarks v. Meigs*, 10 Bosw. 337; *Bickett v. Taylor*, 55 How. Pr. 126. So a receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment or the margin on the contract, is only *prima facie* evidence of the payment of the money, and may be explained by parol testimony: *Winans v. Hassey*, 48 Cal. 635. The broker's authority to sell exists until it is countermanded or revoked by implication; but this question is governed to a great extent by usage and the course of dealing between the parties: *Davis v. Gwynne*, 4 Daly, 218, affirmed in 57 N. Y. 676. Dos Passos, in his excellent work on stock-brokers and stock exchanges, p. 166, explains a practice of Wall street. "Frequently," says he, "a client wishes to limit a loss upon stocks, in which case he gives his broker what is called a 'stop-order,' which authorizes and directs the broker to sell the stocks, or to buy them in, as the case may be, when they arrive at a certain price, in which event the broker must sell or buy when the price reaches his limit; with this reservation, however, that the price at which the broker is directed to sell or buy must be made by some third person. This may be illustrated by the following example: If A, being the owner of one hundred shares of New York Central railroad stock, should direct his broker to sell the same when the stock should reach or be quoted at ninety-nine, in this event it is the duty of the latter to sell at that price; not, however, until some other broker, by a distinct transaction, has made the stock sell at ninety-nine, it being the understanding that a broker cannot make that price himself by the sale of the stock. If, however, the broker, when the stock reaches ninety-nine, is unable to sell at that price, it seems, by the usage of Wall street, that he can sell at the next figure below ninety-nine."

He cites *Smith v. Bouvier*, 70 Pa. St. 325, however, and uses it to illustrate views not in harmony with the practice which obtains in Wall street. In this case, the order was made by the client in a transaction in which he was "short" of stocks, and was as follows: "Buy for my account two thousand shares New York Central, at one hundred and sixty-six; or in the event of

that stock going against me, take the two thousand shares in at one hundred and seventy-five." "Take in" means to buy. The brokers, acting under this order, bought in the shares at an average of one hundred and seventy-four and five eighths, or three eighths below the price mentioned in the order. The question was squarely raised in the case as to whether this was an execution of the order. The construction of the order was left to the jury, who found for the brokers, and the decision was affirmed on appeal. This case is criticised by Dos Passos, p. 167, who says: "Although the act of the brokers in 'buying in' the stock at one hundred and seventy-four and five eighths might have been advantageous to their client, it was not in accordance with the stop-order, which gave them the right to act only when the stock reached one hundred and seventy-five. An agent or broker must obey strictly his instructions, and it is no answer in his mouth to say that by disobeying them an advantage accrued to his principal." In connection with the above, see *Bertram v. Godfray*, 1 Knapp, 381; *Bush v. Cole*, 28 N. Y. 261; *Nesbitt v. Helser*, 49 Mo. 383; *Davis v. Gwynne*, 57 N. Y. 676; *Wicks v. Hatch*, 62 Id. 535. A principal must, within a reasonable time, dissent from the act of his agent if the latter has acted contrary to his instructions. He cannot wait to see whether such action shall result advantageously or disadvantageously and then determine what he will do. Thus, a principal gave his broker orders to sell gold for him if it reached two hundred and seventeen. That price was reached and the broker did not sell, but held on, as the market looked strong, the principal knowing the fact and making no objection thereto. A sudden fall and a sale at a lower price followed, and the broker was held liable only for the actual loss sustained, and not chargeable with any loss from a neglect to sell at the highest point above the limit: *Hope v. Lawrence*, 50 Barb. 258. It is a broker's duty to sell when directed, and a failure to do so will make him liable in *assumpsit* on the money counts for the margin originally deposited with him by the customer: *Jones v. Marks*, 40 Ill. 313. He is also to be governed by the directions of his client; but if he receive none, he does not violate his duty by making a sale according to the general usages of brokers: *Sutton v. Tatham*, 10 Ad. & El. 30. It is the duty of the broker, according to the usage of Wall street, to receive payment for the stock sold, and this is a reasonable practice, as he has possession of the stocks, and is clothed with the apparent ownership, upon which purchasers rely, and who do not even know the principal: Dos Passos on Stock-brokers and Stock Exchanges, 168. A stock-broker cannot sell on credit, for that is not the usual course of his business: *Wiltshire v. Sims*, 1 Camp. 258; *State of Illinois v. Delafield*, 8 Paige, 526; S. C., *sub nom. Delafield v. State of Illinois*, 28 Wend. 192. But the case last cited shows that an authority to sell on credit may be implied where, from the general usages of the trade in which the agent is employed, it is the custom to sell on credit. See also *Van Alen v. Vandepool*, 6 Johns. 69, to the same point. Where stocks are usually sold for cash, the broker will be liable for any loss which may occur by his selling on credit, although in doing so he may act in good faith, and with the object of benefiting his client: *Brown v. Boorman*, 11 Cl. & Fin. 1.

4. LIMITATION OF BROKER'S LIABILITY BY SPECIAL CONTRACT WITH CLIENT.

Where parties have settled the terms and conditions of a contract by agreement, they will be concluded by it, regardless of any usage or custom: *Corbett v. Underwood*, 83 Ill. 324. And a stock-broker may, by special contract, limit his liability in any respect towards his client: *Markham v. Jaudon*, 41 N. Y. 235; *Stenton v. Jerome*, 54 Id. 480; *Robinson v. Norris*, 51 How. Pr. 442; affirmed 6 Hun, 233; *Miliken v. Dehon*, 27 N. Y. 364; *Hyatt v. Argenti*,

3 Cal. 151; *Baker v. Drake*, 66 N. Y. 518; S. C., 23 Am. Rep. 80; *Wicks v. Hatch*, 62 Id. 535. A special contract with brokers growing out of a "straddle" is illustrated by the case of *Harrie v. Tumbridge*, 8 Abb. N. C. 291; affirmed in 83 N. Y. 92; S. C., 38 Am. Rep. 398. Plaintiff purchased through the defendant, a broker, a sixty days' "straddle," that is, a contract by which the plaintiff had the option to either receive or deliver one hundred shares of Lake Shore stock at sixty-two and three fourths for sixty days. The defendant guaranteed that the stock would fluctuate at least eight per cent. The plain object of the "straddle" was to secure the benefit of the possible fluctuations of sixty days; and it remained in defendant's hands until the next day, when he, without express authority, sold "short" one hundred shares of the stock against the "straddle," and closed out the transaction eventually at a loss to plaintiff. From the day the "straddle" was purchased the stock advanced until it reached seventy-three and three eighths, and during the whole period of sixty days covered by the contract, the stock at no time fell below the purchase-price. The plaintiff recovered a judgment in an action on the "straddle," the court holding that the action of defendant, subsequent to the purchase, in purporting to sell "short" against the "straddle," was nugatory. It was also held that it was the broker's duty to have closed the "straddle" by exercising the option at a most favorable time within the sixty days; and that a failure to do so made him liable for what plaintiff lost by his neglect, and that this result could not be affected by any alleged custom of brokers not known to the plaintiff.

5. DUTY OF BROKERS IN SALES FOR "SHORT ACCOUNT," AND TO CLOSE "SHORT" CONTRACT BY BUYING IN STOCK.—A "short sale" is a sale before purchase, with a view of purchasing at a future time at a lower price. To carry out such a speculation, the stock must be temporarily procured by the seller for delivery to the purchaser. Where stocks are sold "short" in the "regular" way, that is, not upon time, "seller's option," it is the broker's duty to deliver them the next day after the sale is made. The broker, not having the stock, is of course compelled to borrow it in order to make a delivery. But if the stocks are sold, to be delivered at a future time, that is, "seller's option" or "buyer's option," then it is not the broker's duty to deliver the stocks until the option expires, or until the purchaser calls for them. The profit or loss depends upon whether the stock rises or falls, and the client has the right to direct his brokers at any time to buy in the stock and close the transaction. Until bought in, the brokers are in duty-bound to the persons from whom they obtain the stock to return to them an equal number of shares, whatever may be the market price at the time it is demanded. For definition of "short sales," see *Smith v. Bouvier*, 70 Pa. St. 325; *Maxton v. Gheen*, 75 Id. 166; *Knowlton v. Fitch*, 52 N. Y. 238, reversing 48 Barb. 493; *Wicks v. Hatch*, 62 Id. 535; *White v. Smith*, 54 Id. 522. Where a stock-broker agrees for a commission to be paid to him, and upon a deposit with him of a stipulated margin to make a short sale for his client, his duty is only partially performed by a sale; as it is a part of the bargain that the broker shall carry the stock for a reasonable time. Otherwise the object of the transaction would be defeated. If the margin is not kept good, the broker may at any time close the transaction upon demand and notice; and he may close it upon notice after he has carried the stock for a reasonable time. He has no right, however, unless granted by express contract, to buy in stock to cover the sale without notice to or direction from his client. If he does so, he will be liable for any loss thus occasioned to his principal: *White v. Smith*, 54 N. Y. 522. The duty of a broker to his client upon receiving an order to sell stocks

"short" is the same which he owes to him in the case of a purchase, which has been above alluded to. So if ordered to sell at a fixed price, he must sell at that price if possible; if at the market price, he must sell at the best possible market price, and is liable to his client for not exercising ordinary care and diligence. The broker has no right to buy in the stocks with which to cover or conclude a "short" sale, without the order or knowledge of the client, unless after notice and demand for additional margin the latter fails to respond. But it is the broker's duty, upon the order or request of the client, to buy the stocks and return them to the person from whom they were originally borrowed. This closes the transaction. If the stocks can be purchased at a lower figure than that for which they were originally sold, the client makes a profit; if not, he suffers. For cases illustrating the duty of brokers to close "short" contract by "buying in" stock, see *Dos Passos* on Stock-brokers and Stock Exchanges, 184-187, citing *Knowlton v. Fitch*, 52 N. Y. 288, reversing 48 Barb. 593; *White v. Smith*, 54 N. Y. 522; *Staples v. Gould*, 9 Id. 520; *Oelricks v. Ford*, 23 How. 49; *White v. Smith*, 6 Lana. 5.

6. COMPULSORY SALE BY BROKER.—It is a broker's duty to give his client notice that the latter's margin is diminished, and that further margin is required where the client fails to put up sufficient margins to meet the fluctuations of the market. The broker cannot summarily, without any previous demand for margin, dispose of his client's stocks; but if the client fails to put up margins sufficient to make the broker safe, the latter can sell the stock upon customary and reasonable notice. Upon these propositions, see *Gruman v. Smith*, 81 N. Y. 25; *Knowlton v. Fitch*, 52 Id. 288; *Stenton v. Jerome*, 54 Id. 480; *Moeller v. McLagan*, 60 Ill. 317; *Corbett v. Underwood*, 83 Id. 324; S. C., 25 Am. Rep. 392; *Baker v. Drake*, 66 N. Y. 518; *Hanks v. Drake*, 49 Barb. 186; *Park v. Musgrave*, 2 Thomp. & C. 571; *Rasch v. His Creditors*, 1 La. Ann. 81; *Oelricks v. Ford*, 23 How. 49. But the mere failure of the client to furnish margins, after notice of a decline or advance in the market, and a demand for margins sufficient to meet the fluctuations of the market, is not sufficient to authorize a broker to sell the stock or close the transaction. It is also the duty of the broker to give to his customer notice of the time and place of sale: *Read v. Lambert*, 10 Abb. Pr., N. S., 428, and cases cited in note thereto; *Wheeler v. Newbould*, 16 N. Y. 392; *Stewart v. Drake*, 46 Id. 449; *Gruman v. Smith*, 81 Id. 25. In making a demand for more margin, and in giving a notice of sale for a failure to comply with a demand for more margin, there are many interesting questions as to detail, but a treatment of them would transcend the limits of this note, and for this reason they are omitted. Another question too extensive for discussion here is, whether a broker can sell to or purchase from his principal, and the effect of such dealing. It may be stated, however, that the relation of principal and agent is applicable to that existing between a stock-broker and his customer; that an agent cannot, without the knowledge and consent of his principal, either sell to or buy from the latter; and that the mere fact of a purchase by an agent from his principal, without the latter's knowledge, of itself vitiates the transaction and renders it void. It is treated as if no sale had been made, and it is immaterial whether there is any evidence or intention of fraud or not: See *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 49 Id. 301; S. C., 58 Id. 425; *Pickering v. Demeritt*, 100 Mass. 416; *Day v. Holmes*, 103 Id. 306; *Martin v. Moulton*, 8 N. H. 504; *Marye v. Strouse*, 5 Fed. Rep. 483; *Commonwealth v. Cooper*, 15 Am. L. Rev. 360; *Michoud v. Gtrod*, 4 How. Pr. 503; *Bragg v. Meyer*, 1 McAll. 408; *Levy v. Loeb*, 85 N. Y. 365; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Stokes v. Frazier*, 72 Id. 428; *Hamilton v. State Bank*, 23

Iowa, 306; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore Marine Ins. Co. v. Dalrymple*, Id. 269; *Bryson v. Rayner*, Id. 424; *Star Fire Ins. Co. v. Palmer*, 9 Jones & S. 267; *Richardson v. Mann*, 30 La. Ann. 1060; *Hope v. Lawrence*, 1 Hun, 317; *Duden v. Waitzfelder*, 16 Id. 337; *Ainsworth v. Bowen*, 9 Wis. 348; *Hestonville R. R. Co. v. Shields*, 3 Brewst. 257. But as to the rule that a broker cannot buy or sell, there seems to have been an exception lately introduced in the court of appeals of the state of New York. It was there held that, where stocks were sold at the board of brokers "under the rule" (By-laws N. Y. Stock Exchange, art. 18, sec. 1), by a broker who had loaned money on them to a fellow-broker, the proceeding was in the nature of a foreclosure, and that the creditor might himself become the purchaser. Church, C. J., said: "It must be assumed that a person selling stock under the rule has a right to purchase himself. The object is to foreclose the claim of the mortgagor or pledgor, and, in analogy to other similar cases, the pledgee or mortgagee may become the purchaser." *Quincy v. White*, 63 N. Y. 370. In fact, the rule now seems to be that a broker or pledgee may become the purchaser of the pledged security at a judicial sale held under a decree to foreclose the pledge: Id.; *Bryan v. Baldwin*, 7 Lans. 174; *Wright v. Ross*, 36 Cal. 414; *Newport etc. Bridge Co. v. Douglass, Trustee, etc.*, 12 Bush, 720; *Bryan v. Baldwin*, 52 N. Y. 232.

7. CLOSE OF TRANSACTION.—ACTING BY SUBSTITUTE.—A stock-broker may, at his option, close a stock transaction with his client by requiring him, upon reasonable notice, to take the stocks which he may be carrying for him. It would seem, too, that although the client's margin may not be exhausted, the broker is not bound to continue the transaction indefinitely: *Stenton v. Jerome*, 54 N. Y. 480; *White v. Smith*, Id. 522; *Sterling v. Jaudon*, 48 Barb. 459; *Esser v. Linderman*, 71 Pa. St. 76; *Mervin v. Hamilton*, 6 Duer, 244. It is a general rule that an agent cannot depute his discretionary duties to another, except in cases of necessity, or in cases in which such deputation is sustained by usage, of which it may be implied that the principal is cognizant. And this rule governs stock-brokers, for we have seen that the relation between a stock-broker and his client is that of principal and agent. So if a principal constitute an agent to do a business which obviously and from its very nature cannot be done by the agent otherwise than through a substitute, or if in relation to that business there exists a known and established usage of substitution, the principal would in either case be held to have expected and to have authorized such substitution: *Cockran v. Islam*, 2 Man. & Sel. 302; *Moon v. Guardians of Whitney*, 3 Bing. N. C. 814; *Ledoux v. Goza*, 4 La. Ann. 160; *White v. Fuller*, 4 Hun, 631; *Etwell v. Chamberlain*, 2 Bosw. 230; *Commercial Bank v. Norton*, 1 Hill (N. Y.), 501. And it seems to be a usage prevalent in Wall street for brokers to transact business for their clients through one or more subordinate brokers who are necessarily employed, for either secrecy or dispatch, to fill the orders of customers. For cases illustrating this principle as applicable to stock-brokers, see *Gheen v. Johnson*, 90 Pa. St. 38; *Gregory v. Wendell*, 40 Mich. 432; *Rosenstock v. Tormey*, 32 Md. 169; S. C., 3 An. Rep. 125.

8. USAGES.—Where a client employs a stock-broker to buy or sell stocks for him, he is presumed to authorize him to deal according to the custom of brokers; and a stock-broker, in the execution of his orders, has an implied authority to follow the rules and usages of the stock exchange. Such presumption and implied authority have been established in a multitude of cases; See principal case; *Nourae v. Prime*, 4 Johns. Ch. 489; S. C., 7 Id. 69; *Lawrence v. Maxwell*, 53 N. Y. 19; *Whitehouse v. Moore*, 13 Abb. Pr. 142; *White*

v. *Baxter*, 9 Jones & S. 358; S. C., 71 N. Y. 254; *Kingsbury v. Kirwin*, 11 Jones & S. 451, affirmed in 77 N. Y. 612; *Wells v. Bailey*, 49 Id. 464; S. C., 10 Am. Rep. 407; *Rosenstock v. Tormey*, 32 Md. 169; S. C., 3 Am. Rep. 125; *Sumner v. Stewart*, 69 Pa. St. 321; *Durant v. Burt*, 98 Mass. 161; *Cameron v. Durkheim*, 55 N. Y. 425; *Baker v. Drake*, 66 Id. 518; *Corbett v. Underwood*, 83 Ill. 324; *Sutton v. Tatham*, 10 Ad. & El. 27; *Smith v. Lindo*, 5 Com. B., N. S., 587; *Mitchell v. Newhall*, 15 Mee. & W. 308; *Mortimer v. McCallan*, 6 Id. 58; *Hodgkinson v. Kelly*, L. R. 6 Eq. 501; *Adams v. Peters*, 2 Car. & Kir. 723; *Marten v. Gibbon*, 33 L. T. R., N. S., 561; *Stewart v. Cauty*, 8 Mee. & W. 160; *Johnston v. Osborne*, 11 Ad. & El. 549; *Cruse v. Paine*, L. R. 4 Ch. Ap. 443; *Grissell v. Bristowe*, L. R. 4 C. P. 36; *Lacey v. Hill*, L. R. 8 Ch. App. 921; *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; *Field v. Leleau*, 6 Hurl. & N. 617; *Dickenson v. Lilwal*, 1 Stark. 128; S. C., 4 Camp. 279; *Humphrey v. Dale*, 7 El. & Bl. 266. And this rule does not relate solely to dealings between brokers and their clients; but applies to dealings between brokers themselves, and they are presumed to know the usages of their own business: *Durant v. Burt*, 98 Mass. 161; *Colket v. Ellis*, 10 Phila. 375; *Hoffman v. Livingston*, 14 Jones & S. 552; *Peabody v. Speyers*, 56 N. Y. 230. To the general rule that one can only be bound by a usage of which he is shown to have knowledge, there is a decided exception in stock transactions between a broker and his client. When the client employs a member of the stock exchange to transact business, he necessarily gives him the means to carry it through. The broker can, of course, only do this by making the transaction in accordance with the course of business prevailing in the exchange, and founded upon the rules and usages of the exchange. It results as a natural consequence that the client cannot avail himself of his supposed ignorance of the way in which business is conducted among brokers: See *Mitchell v. Newhall*, 15 Mee. & W. 308; *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425. There are, however, in the United States, a number of cases arising out of stock transactions in which the usages of brokers have been rejected: *Allen v. Dykers*, 3 Hill (N. Y.), 593, affirmed in 7 Id. 497; *Wheeler v. Tewbould*, 16 N. Y. 392; *Markham v. Jaudon*, 41 Id. 235; *Harris v. Tumbridge*, 83 Id. 92; *Vermiley v. Adams Express Co.*, 21 Wall. 138; *Evans v. Waln*, 71 Pa. St. 69; *Pickering v. Demeritt*, 100 Mass. 421; *Day v. Holmes*, 103 Id. 306. The same is true in England: See *Ex parte Neilson*, 3 DeG. M. & G. 560, note; *Pearson v. Scott*, 38 L. T. R., N. S., 747; *Langton v. Waite*, L. R. 6 Eq. 165; *Robinson v. Mollett*, 7 H. L. Eng. & Irish App. Cas. 802; *Tomkins v. Saffery*, 3 L. R. App. Cas. 213; *Sweeting v. Pearce*, 7 Com. B., N. S., 449; *Marted v. Paine*, L. R. 4 Exch. 81; *Mages v. Atkinson*, 2 Mee. & W. 439; *Westropp v. Solomon*, 8 Com. B. 345.

MOORE v. CROSS.

[19 NEW YORK, 227.]

INDORSEMENT OF NEGOTIABLE NOTE BY PERSON NOT PARTY TO IT, with intent to give it credit with the payee, renders the person making it liable as an indorser to the payee.

APPEAL from a judgment against defendant sued as indorser of a promissory note. The facts appear in the opinion. The decision affirmed is reported in 23 Barb. 534.

S. F. Clarkson, for the appellant, the indorser.

D. McMahon, for the respondent, the payee and holder.

By Court, JOHNSON, C. J. This action is upon a promissory note made by one McGervey, payable to the order of James Moore, and indorsed in blank by John A. Cross, James Moore, and John McNamee. The plaintiff is the James Moore to whose order the note is payable. It was proved that upon a negotiation for a sale of coal by Moore to McGervey, Moore agreed to sell him the coal for his note indorsed by Cross, and that for this purpose Cross indorsed the note. The sale accordingly took place, and the coal and the note indorsed by Cross were respectively delivered. The note was discounted for Moore at the Atlantic Bank, and being unpaid at maturity, was duly demanded and notice duly given to Cross. It was subsequently taken up at the bank by Moore, the plaintiff. The question is, whether on this state of facts Moore can recover in his action against Cross.

It is quite conceivable that in the ordinary course of business a promissory note may, before it falls due, come to the hands of a person who already appears upon it as payee or indorser. In such a case, he cannot maintain an action against any of the parties whose indorsements are subsequent to the first appearance of his name. The legal reason is, that each of those persons, on paying to him the note, would have an immediate right to demand payment for him on his earlier indorsement. The law, to avoid this circuitry, denies an action to a party thus situated. If the note had passed through his hands without indorsement, or if it had been indorsed without recourse by him, the reason would not exist; and there could be no objection founded on his prior holding or indorsement, to the maintenance of an action by him against the parties liable on the note.

Again: if a note be made and indorsed for the accommodation of A, who indorses it to another person, and afterward in the course of trade again becomes the holder, he could maintain no action against the maker and indorser for his accommodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing.

This, in principle, is very like what the plaintiff seeks to maintain in this case. Having brought his action as holder, and producing the paper indorsed in blank, he has *prima facie* made out a title as such; and to rebut the inference which arises on the face of the paper, that a recovery by him against Cross would only lead to a new recovery by Cross against him, he shows that the defense of circuitry is not available against him, inasmuch as Cross could have, by the original agreement of the parties, no recovery against him. The case is, as to its legal merits, the same as if Cross had taken up the paper from the bank, and brought an action against Moore as payee, and in such a case no one could doubt the competency of the proof of the facts now in proof, or their conclusiveness to defeat Cross's action: *Labron v. Woram*, 1 Hill (N. Y.), 91. Between parties thus standing in immediate privity with each other, an action could no more have been maintained by Cross against Moore than it could had Moore been strictly an accommodation indorser for Cross.

When this note was originally in Moore's hands, the blank indorsement of Cross could have been rendered entirely conformable to the real agreement and object of the parties by Moore's making his own indorsement without recourse in terms. Upon such an indorsement, the paper would no longer have afforded a *prima facie* answer to Moore's action against Cross; nor could Cross have maintained that such an indorsement was unwarranted, as it would have exactly carried out the intention of the parties. Between these parties, I can see no reason why the indorsement might not thus have been made at the trial; or why it may not now, being a mere matter of form and the right to make it being proved, be treated as made.

Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty, and charging the indorser as a maker or guarantor. This doctrine was advanced in *Herrick v. Carman*, 12 Johns. 160, and was adjudged in *Nelson v. Dubois*, 13 Id. 175, and *Campbell v. Butler*, 14 Id. 349. It was attacked in *Dean v. Hall*, 17 Wend. 214, and in *Seabury v. Hungerford*, 2 Hill (N. Y.), 80; and was finally overthrown in *Hall v. Newcomb*, 3 Id. 233, and the same case in error, 7 Id. 416 [42 Am. Dec. 82]. The chancellor, in his opinion in the latter case, says: "If the object of the second indorser was to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse

it without recourse; and by such indorsement, may either make it payable to the second indorser, or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser." He proceeds to say that the party might proceed on the common counts, giving a copy of the note and indorsements; but that he must in either case show demand and notice to charge the indorser. In *Spies v. Gilmore*, 1 N. Y. 321, the doctrine came before this court under slightly different circumstances. Want of demand and notice were held to be excused upon the circumstances of the case in the superior court. In this court, it was discussed and decided on the question of the sufficiency of the excuse, and not an intimation is to be found throwing any doubt upon the position that had those defects not existed the plaintiff might have recovered. The later cases of *Brown v. Curtiss*, 2 Id. 225, *Hall v. Farmer*, Id. 553, and *Durham v. Manrow*, Id. 533, being upon written guaranties, and not upon indorsements, are not applicable to this case.

The cases of *Herrick v. Carman*, 10 Johns. 224, S. C., 12 Id. 159, and *Tillman v. Wheeler*, 17 Id. 326, are entirely in harmony with this view. In neither of them was it made to appear that the second indorser put his name on the paper to give the maker credit with the payee. On that ground each of them was decided, while the whole scope of the opinions shows that with that proof the court would have sustained a recovery. The case of *Waterbury v. Sinclair*, 16 How. Pr. 329, sustains the general position of the plaintiff, as do the opinions of Mr. Justice S. B. Strong and Mr. Justice Emott, though the decision of the former was overruled upon the ground that there should have been an actual indorsement without recourse. It seems to me that, under the present system, if a right so to indorse appears, and it may be done even at the trial, that substantial justice is promoted by regarding it as done, and looking upon its actual doing as the merest matter of form.

The recovery was founded on correct legal principles. The fact that an indorsement without recourse would present exactly such a case as might frequently happen in the transaction of business, and, if so happening, would strike no one as violating the ordinary theory of promissory notes, shows

that the real rights of these parties are capable of being enforced without violence to any rule of law, under the contract they have actually made.

All the judges concurred.

Judgment affirmed.

INDORSEMENT OF NEGOTIABLE NOTE BY STRANGER, AND BEFORE ITS DELIVERY TO PAYEE, EFFECT OF: See *Fitzhugh v. Love's Executor*, 3 Am. Dec. 568, and extended discussion of the question in the note thereto 571-575; *Moies v. Bird*, 6 Id. 179; *Perkins v. Catlin*, 29 Id. 282, and extended note thereto 297-299; *Martin v. Boyd*, 35 Id. 501; *Nash v. Skinner*, 36 Id. 338; *Stoney v. Beaubien*, 39 Id. 128; *Bright v. Carpenter*, 34 Id. 432; *Samson v. Thornton*, 37 Id. 135; *Camden v. McKoy*, 38 Id. 91, and note 99; *Powell v. Thomas*, Id. 465; *Hall v. Newcomb*, 42 Id. 82, and note 86; *Union Bank v. Willis*, 41 Id. 541; *Aiken v. Cathcart*, 45 Id. 764; *Sylvester v. Downer*, 49 Id. 786, and note 790; *Colburn v. Averill*, 50 Id. 630; *Lewis v. Harvey*, 59 Id. 286; *Cook v. Southwick*, 60 Id. 181; *Essex Co. v. Edmands*, 71 Id. 758; *McComb v. Thompson*, 72 Id. 84. Most of the above cases make the person so signing a joint promisor; but for cases holding him simply to the liability of an indorser, see note to *Perkins v. Catlin*, 29 Id. 297, and cases cited therein; note to *Hall v. Newcomb*, 42 Id. 86; *Aiken v. Cathcart*, 45 Id. 764.

THE PRINCIPAL CASE WAS CITED IN each of the following cases and to the point stated: One who indorses a promissory note to give the maker credit with the payor is liable to the payee as an indorser: *Luft v. Graham*, 13 Abb. Pr. 178; S. C., 44 How. Pr. 154; *Darnall v. Morehouse*, 36 Id. 529; *Haviland v. Haviland*, 14 Hun, 617; *Hauck v. Craighead*, 8 Id. 240; *Meyer v. Hieber*, 47 N. Y. 270; *Lynch v. Levy*, 11 Hun, 146; *Jaffray v. Brown*, 74 Id. 394; *Phelps v. Fischer*, 50 Id. 73; although the indorsement was without consideration: *Schwaransky v. Averill*, 7 Daly, 256. Where a negotiable note has been indorsed before delivery to the payee, the person making such indorsement is presumed to have intended to become liable as second indorser. On the face of the paper, without explanation, he is to be regarded as second indorser, and of course, not liable upon the note to the payee, who is supposed to be the first indorser. As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee: *Coulter v. Richmond*, 59 N. Y. 481. And where in fact the party to such a note, standing in form as second indorser, put his name upon it with the intention and for the purpose of becoming security to the payee of the note for the debt of a third person, he will be so held; and in such a case the payee may indorse the note without recourse, transfer it to another, and the second indorser will be liable, without right of recourse to the payee: *Cloëlier v. Adriance*, 51 Id. 325; *Coulter v. Richmond*, 59 Id. 482; *Lynch v. Levy*, 11 Hun, 146. To overcome the presumption that one who indorses as above stated is a second indorser, the payee must show that the note was indorsed to give credit to the note with the payee, and that the payee has parted with value upon the credit of such indorsement: *Draper v. Chase Mfg. Co.*, 2 Abb. N. C. 80; *Woodruff v. Leonard*, 1 Hun, 632; *Smith v. Smith*, 5 Jones & S. 205; *Hull v. Marvin*, 2 Thomp. & C. 420. Where, by agreement between a prior and subsequent indorser of a promissory note, the latter is to

be liable upon his indorsement to the former, upon retransfer of the note the agreement is binding, and will be enforced: *Hubbard v. Matthews*, 54 N. Y. 48. Where a prior indorser cannot maintain an action against a subsequent indorser, no person deriving title under the prior indorser, with knowledge of the facts, can recover against such subsequent indorser: *Bacon v. Burnham*, 37 Id. 617. The position of the signature seems to be unimportant: *Hauck v. Craighead*, 8 Hun, 240. The principal case was distinguished in *Lewis v. Jones*, 7 Bosw. 371, and commented upon in *Lester v. Paine*, 39 Barb. 619.

DE PEYSTER v. SUN MUTUAL INS. CO.

[19 NEW YORK, 272.]

MARINE POLICY ON VESSEL "at and from S. M. (a port on the Spanish Main) to New York, which allows the vessel to use three ports" on the voyage from the Main to New York, allows her to touch at ports (not exceeding three) on the Main.

MEMORANDUM CLAUSE IN MARINE POLICY INCLUDES, as totally lost, articles which by having been water-soaked in a storm are rendered putrid so that they cannot be carried to the port of destination without endangering the health of the crew, although they retain form and substance enough to be of some value.

APPEAL from a judgment reversing a judgment upon a policy of marine insurance, and ordering a new trial. The facts appear in the opinion. A decision of the supreme court in the cause is reported in 17 Barb. 306; also 12 N. Y. Leg. Obs. 75.

William M. Evarts, for the appellants, the insured.

Francis B. Cutting, for the respondents, the insurance company.

By Court, GROVER, J. The motion of the defendant's counsel for a nonsuit was properly denied by the court. The question whether there had been a deviation of the vessel depends upon the construction of the following clause added to the policy, September 6, 1842: "It is agreed for one per cent additional premium, that the brig Alfred Hammond may have the privilege of performing a voyage from Santa Martha to Chagres and back to Carthagena, and also for three quarters per cent additional premium, that said brig or any other vessel or vessels may use three additional ports on the voyage from the Spanish Main to New York; to return one quarter per cent for each port not used, and no loss being claimed." The policy was originally upon a voyage from Santa Martha to New York, with liberty to use two additional ports. It was shown that vessels engaged in trade upon the Main were accustomed to visit dif-

ferent ports upon the coast for the purpose of discharging the outward and taking in the homeward cargo, and when the latter was completed, to sail directly for New York, touching at no port after leaving the Main. The question is, whether the vessel was at liberty to use the additional ports, specified in the clause added to the policy, upon the Main, or only after her final departure from the Main upon her voyage to New York. The two additional ports that by the original policy the vessel was at liberty to use evidently were ports upon the Main. The voyage was referred to as a whole from Santa Martha to New York, with liberty to use two additional ports. The word "from," in the additional clause, does not necessarily exclude ports upon the Main. Such ports are included, if the voyage by the clause is referred to as a whole. The ports are described as additional to the ports the vessel was then at liberty to use. These were ports upon the Main. The intention of the parties is apparent from the terms used; and the course of trade includes ports upon the Main. There was then no deviation.

The exceptions taken by the defendant's counsel to the charge of the judge, and his refusals to charge, present the question whether a recovery can be had upon a loss of property insured, embraced in the usual memorandum clause—that is, warranted free from average unless general—where it becomes impossible to transport the same to its port of destination in consequence of the perils insured against, when any portion of the property exists in specie, at an intermediate port of distress. The law in this state is settled that there can be no recovery in case of loss of memorandum articles, when any portion thereof arrives in specie at the port of destination, although possessing no value there: *Maggrath v. Church*, 1 Cai. 196 [2 Am. Dec. 173]; *Leroy v. Gouverneur*, 1 Johns. Cas. 226; *Wadsworth v. Pacific Insurance Co.*, 4 Wend. 33. While any portion of such articles remains in specie, capable of being transported to the terminus of the voyage, and within the control of the assured, he cannot recover for a total destruction of a portion of the property, or for the loss of value, however serious such loss may be: See cases cited above. The English law differs in this respect, that by the latter, when there is a total destruction of a distinct portion of the property insured, a recovery *pro tanto* may be had: 2 Arnould on Insurance, 1033 et seq., and cases there cited. The precise point involved in this case remains unsettled by judicial authority in this state. The English rule makes the insurer responsible when it becomes impossible from any

of the perils covered by the policy to transport the property to its port of destination: *Roux v. Salvador*, 3 Bing. N. C. 526.

The same doctrine is held by the supreme court of the United States: *Hugg v. Augusta Ins. Co.*, 7 How. 595; also by the supreme court of Maine: *Williams v. Kennebec Ins. Co.*, 31 Me. 455. The principle of the above cases I think sound. By the contract, the assured undertakes that the property shall be transported to its port of destination, and but for the qualifying force of the memorandum clause, he would be bound for its delivery uninjured by any of the perils embraced in the policy. When the delivery of any portion of the property at its port of destination becomes impossible, by reason of any of the perils assumed by the assurer, his contract is broken. The voyage is lost. The case comes within the direct terms upon which the assurer has consented to become bound. The loss is, within the meaning of the contract, absolutely total. The assured is absolutely prevented from receiving any portion of the goods at the place where the assurer has undertaken that he shall receive them. This gives a right of recovery. The exception does not raise the point insisted upon by the defendant's counsel, whether the hides might not have been put in such a condition as to render it possible that some of them might have been transported to New York. The justice was not requested to submit that question to the jury. It cannot therefore be considered here. The verdict of the jury concludes the parties in this court upon the question of fact, and by that verdict it is established that the arrival of any of the property insured at New York was rendered impossible by the perils covered by the policy. The judge who tried the cause committed no error in his charge to the jury, and in his refusal to charge as requested.

The judgment should therefore be affirmed.

ALLEN, J., did not sit in the case.

All the other judges concurred.

Judgment affirmed.

DEVIATION—MARINE INSURANCE.—As to what constitutes a deviation from line described in marine policy, see *Perkins v. Augusta Ins. Co.*, 71 Am. Dec. 654, and collected cases in note thereto 661. Where articles are included in a memorandum as perishable, they must be completely destroyed before the insured can recover as for a total loss: *Magrath v. Church*, 2 Id. 173, and note 172.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: In *Wallerstein v. Columbian Ins. Co.*, 3 Robt. 538, the principal case was referred to, but the doctrine was there announced that if any part of the insured property arrived at the port of destination, in specie, although utterly valueless, the underwriters were not liable. This, it will be perceived, is founded on the doctrine of absolute total loss; and this appears to have found favor in *Burt v. Brewers' etc. Ins. Co.*, 9 Hun, 386, where the principal case was quoted from. But the principal case was cited in *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 218, overruling same case, *supra*, to the point that while there may not be an actual total loss of the thing insured, the doctrines of the courts tend strongly to the rule that there may be a constructive total loss.

KIMBERLY v. PATCHIN.

[19 NEW YORK, 330.]

SALE OF LARGE AND CUMEROUS MERCHANDISE here of grain in bulk may pass the title without actual separation of the quantity sold from a larger mass with which it is mixed, if the acts and declarations of the parties clearly evince an intent to make immediate transfer of ownership.

APPEAL from a judgment on a verdict directed for plaintiff in an action for conversion. One Dickinson, being owner of a large quantity of wheat, agreed with Shuttleworth upon a sale to him of six thousand bushels, and gave him a bill of sale and warehouse receipt, and received the price; but no actual separation of the quantity sold was made. Afterward Dickinson sold the entire mass of wheat to another person. The plaintiffs claimed title under the second buyer, while defendants had bought from Shuttleworth, and had also obtained possession by means of a replevin suit. The replevin suit resulted in a judgment sustaining the validity of the sale to Shuttleworth; and upon the argument below, in the present action, the defendant below relied on that judgment as estopping plaintiffs from contesting the sale; but the judge ruled that as the replevin judgment was not between the same parties, it was no estoppel, and directed a verdict for plaintiffs, which the full bench sustained. The court of appeals, however, disregarded the question of estoppel, and examined the validity of the sale to Shuttleworth as if there had not been any adjudication upon it.

John H. Reynolds, for the appellant.

John C. Talcott, for the respondents.

By Court, COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former

owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the eighteenth of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of six thousand bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the six thousand bushels, subject to the vendee's order. Of the price, two thousand six hundred dollars was paid down, and the residue, one thousand six hundred dollars, which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far, the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related was estimated by the parties at six thousand bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was six thousand two hundred and forty-nine, being an excess of two hundred and forty-nine bushels. When Shuttleworth bought the six thousand bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the six thousand bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words, a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the

only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason or logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel, or specify what horse or what picture it is that belongs to him. It is not only legally but logically impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass if the sale is complete in all its other circumstances. An actual delivery, indeed, cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is

separated from the residue. But actual delivery is not indispensable in any case in order to pass a title if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it, and for another man to own the residue, without a separation of the parts? To bring the inquiry to the facts of the case, in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances, could Shuttleworth become owner of six thousand bushels, and Dickinson of the residue, which turned out to be two hundred and forty-nine bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being a prior owner of the whole, had given to S. a bill of sale of six thousand bushels, and then one to D. for the residue, more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to six thousand bushels, and the other to what remained after that quantity was subtracted.

Again: suppose Dickinson having in store and owning two hundred and forty-nine bushels, Shuttleworth had deposited with him six thousand bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property, where neither would lose his title. In the law of bailments, it is entirely settled that S., being the bailor of the six thousand bushels, would lose nothing by the mixture, and it being done by consent, it is also clear that the bailee would lose nothing: *Story on Bailm.*, sec. 40; 2 *Bla. Com.* 405.

These and other illustrations which might be suggested demonstrate the possibility of a divided ownership in the six thousand two hundred and forty-nine bushels of wheat. If, then, the law admits that the property while in mass could exist under that condition, it was plainly competent for the

parties to the sale in question so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own six thousand bushels without a separation from the residue. And this, I think, is precisely what was done. The six thousand bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case, the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now, the contract of sale and bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange indeed if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these will be cited. In *Whitehouse v. Frost*, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "accepted" on the face of the order and signing their names. It was held by the English common pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810. In the following year the case of *Jackson v. Anderson*, 4 Taunt. 24, was decided in the king's bench. That was an action of trover

for one thousand nine hundred and sixty pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres, remitted to Laycock & Co., at London, four thousand seven hundred dollars, and advised the plaintiffs that one thousand nine hundred and sixty of the number were designed for them in payment for goods bought of them. Laycock & Co. received the four thousand seven hundred pieces and pledged the whole of them to the defendant, who sold them to the Bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of the one thousand nine hundred and sixty dollars to the plaintiffs; 2. That the plaintiffs and defendant did not become joint tenants, or tenants in common of the dollars; 3. That, although no specific dollars were separated from the residue for the plaintiffs, yet, as the defendant had converted the whole, trover would lie for the plaintiffs' share. Of course, the action in its nature directly involved the plaintiffs' title, and it was held that the sale or appropriation of a part without any separation was a perfect sale. In *Pleasants v. Pendleton*, 6 Rand. 473 [18 Am. Dec. 726], the sale—omitting immaterial circumstances—was of one hundred and nineteen out of one hundred and twenty-three barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia court of appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale: See also *Damon v. Osborn*, 1 Pick. 477 [11 Am. Dec. 229]; *Crofoot v. Bennett*, 2 N. Y. 258. In the last mentioned, which was decided in this court, the sale was of forty-three thousand bricks in an unfinished kiln containing a larger quantity. A formal possession of the whole brickyard was taken by the purchaser. It was held that he acquired title to the forty-three thousand, although no separation was made. In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery, therefore, did not make the sale, and if part could not be sold without being separated, I do not see how a formal delivery of the whole brickyard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity, "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change

the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was, in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is, in short, a strong authority to prove that, in sales by weight, measure, or count, a separation of the part sold from the mass is not, in all cases, a fundamental requisite.

Referring now to cases where it has been held that sales of this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that in the instance before us the title was changed. In *White v. Wilks*, 5 Taunt. 176, a merchant sold twenty tons of oil, out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "one shilling per ton per week, rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In *Austen v. Craven*, 4 Taunt. 644, there was a contract to sell two hundred hogsheads of sugar, to be four different kinds and qualities, which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per hundred weight, requiring that the sugar should be weighed in order to ascertain the price. In these circumstances, the case was considered plainly distinguishable from *Whitehouse v. Frost*, 12 East, 614, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although, perhaps, one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently

cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us, the vendor not only executed his bill of sale professing to transfer six thousand bushels of wheat, but waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property, for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat, it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract, and all parts are of the same value and undistinguishable from each other.

One of the cases, however, not yet cited, deserves a brief consideration, because it was determined in this court, and has

been much relied on by the plaintiff's counsel. I refer to *Gardiner v. Suydam*, 7 N. Y. 357. The owner of flour delivered it in various parcels to a warehouseman, and from time to time took receipts from him. One of these receipts was held by the defendants, and others by the plaintiff, both parties having accepted and paid drafts on the faith thereof. The defendants' receipt was the first in point of time, and was for five hundred and thirty-six barrels, being given at a time when in fact there were but two hundred and one barrels in the warehouse, so that it covered three hundred and thirty-five more than were then on hand. But other quantities were subsequently delivered at the warehouse, all of the same kind and quality, and the defendants in fact received by shipment to them five hundred barrels. For the conversion of this quantity, they were sued by the plaintiffs who had failed to receive the flour which the receipts called for. It cannot fail to be seen from this statement that the defendants, having the first receipt, and receiving no more flour than it specified, were entitled to judgment by reason of the priority of their title; and this ground of decision is very clearly stated in the opinion of the chief judge. He thought if the transfer of the receipts could pass the title to the flour, notwithstanding the mixture of all the quantities together, that the one held by the defendants entitled them not only to the two hundred and one barrels in store when it was given, but also to so many barrels delivered in store afterwards as were necessary to make up their number. This view, which appears to me correct, was fatal to the plaintiffs' case. But in another aspect of the controversy, the learned chief judge was of opinion that the transfer to the plaintiffs of the receipts held by them passed no title, on the ground that the quantities which they respectively covered were all mixed together in the storehouse. Assuming the correctness of that view—which I am constrained to question—the case is still unlike the present one. The transfer of a warehouseman's receipt, given to the owner, was certainly no more than a simple sale note of the specified number of barrels; and where, in such cases, that is the whole transaction between vendor and vendee, I have already admitted a doubt, suggested by conflicting cases, whether the title passes. If the owner of the flour had held it in his own warehouse, and had not only given a bill of sale of a portion of it, but had himself executed to the purchaser another instrument declaring that he held the quantity sold as bailee and subject to order, then the case would have resembled the one now to be determined.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the six thousand bushels of wheat. Of that quantity he took possession at Buffalo, by writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of six thousand, and the plaintiffs of two hundred and forty-nine, parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed, and a new trial granted.

GRAY and GROVER, JJ., dissented.

STRONG, J., expressed himself as inclined to concur, if necessary to a decision; but it being unnecessary, he reserved his judgment.

Judgment reversed, and new trial ordered.

BULKY ARTICLES, CONSTRUCTIVE DELIVERY OF, SUFFICIENT TO PASS TITLE: *Winslow v. Leonard*, 62 Am. Dec. 354, and note 359. But for an invalid sale of hay, see *Sleeper v. Pollard*, 67 Id. 741. Sale of personal property is complete, and passes title to buyer, although the thing sold has not been measured or the quantity ascertained in any way, when it is apparent that it is the intention of the seller to transfer the title, and of the buyer to accept it: *Sewell v. Eaton*, 70 Id. 471. For an application of this principle to a sale of barrels of flour in a warehouse, see *Horr v. Barker*, Id. 791, and note 797, showing that measuring and setting apart goods are not essential to perfect sale, except when it is necessary in order to define the subject-matter.

THE PRINCIPAL CASE WAS CITED in each of the following cases, and to the point named: Where property in a store is conveyed and receipt taken for the same, the court will assume the identity of the property in the store at the date of the receipt with that mentioned in the receipt: *Parshall v. Eggert*, 54 N. Y. 25. One tenant in common has the right to sever and take his own share of personal property where the property is all of the same kind: *Chap-*

man v. Lusk, 2 Lens. 215; *Sale v. Sun Mutual Ins. Co.*, 3 Robt. 607; *Clark v. Griffith*, 24 N. Y. 597. Trover will lie for the conversion of determinate sums, though the specific coin and bills cannot be identified: *Gordon v. Hostetter*, 37 Id. 104; S. C., 4 Abb. Pr., N. S., 269. Where a party sells goods not manually delivered, he has a lien for the purchase-money, and if the purchaser disposes of the goods, the first seller may have an action for money had and received: *Wilmot v. Richardson*, 2 Keyes, 527; S. C., 4 Abb. App. Dec. 616. Title depends upon the intention of the parties, and the parties may provide in their contract that the title shall pass when the facts would not, in the absence of such a stipulation, show a change: *Bradley v. Wheeler*, 44 N. Y. 501; *Welch v. Moffat*, 1 Thomp. & C. 578; *O'Neill v. N. Y. Cent. etc. R. R. Co.*, 3 Id. 402. It is competent for parties to agree that a thing is to be the property of a purchaser, and where the mutual consent to that effect is shown by unequivocal acts or declarations, the title passes before delivery: *Wright v. O'Brien*, 5 Daly, 56. Upon a sale of a specified quantity of grain, its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass the title when the intention to do so is otherwise made clearly manifest: *Rodes v. Wade*, 47 Barb. 63; *Newell v. Warner*, 44 Id. 263; *Higgins v. Delaware, L. & W. R. R.*, 60 N. Y. 555; *McNamara v. Edmister*, 11 Hun, 600; *Lobdell v. Stowell*, 51 N. Y. 74; *Russell v. Carrington*, 42 Id. 122; *Foot v. Marsh*, 51 Id. 292; *Groat v. Gile*, Id. 436. The principal case was distinguished from *Currie v. White*, 1 Sweeny, 195, in this, that in the principal case the contract in question was complete, and intended to be so by the parties; while in *Currie v. White*, *supra*, S. C., 6 Abb. Pr., N. S., 374, it was not, and it was therefore held that a different rule would prevail regarding title. The principal case was also distinguished from *Cook v. Millard*, 65 N. Y. 365, in this, that in the principal case the property sold was a given quantity of an indistinguishable mass having a common value, while in the case of *Cook v. Millard*, *supra*, the goods were not.

CHAPMAN v. NEW HAVEN RAILROAD COMPANY.

[19 NEW YORK, 841.]

CONTRIBUTORY NEGLIGENCE OF INJURED PARTY WILL PREVENT HIS RECOVERY OF DAMAGES from the other negligent party, unless the negligence of the latter is so gross as to be equivalent in law to willful injury.

RAILROAD PASSENGER INJURED BY COLLISION OF TRAINS BELONGING TO DIFFERENT PROPRIETORS MAY RECOVER of the proprietors of the train he is not on, although the managers of the train he is on are guilty of negligence. The negligence of the officers of the train does not extend to or affect the passenger.

DEFENDANTS' train was standing on a track used by two different companies. It was the duty of defendants to leave the track clear for the other company's train. The latter came in at a high rate of speed, disregarding defendants' signal, and just as defendants' train was moving out. The trains came into collision, and plaintiff, who was on the incoming train, was injured, and brought suit against defendants. Judgment for defendants, and plaintiff appealed.

William C. Noyes, for the appellant.

Henry G. Wheaton, for the respondents.

By Court, JOHNSON, C. J. The collision from which the plaintiff's injury resulted occurred on the track of the New York and Harlem Railroad Company, between a train of that company and a train of the defendants. The plaintiff was a passenger in the Harlem train, which ran into the defendants' train, both being in motion towards New York. There was evidence of negligence in the management of each train, and the position upon which the defendants rely is, that such negligence on the part of the Harlem train as would preclude that company from an action against the defendants will also preclude the plaintiff from sustaining his action. The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule, a natural and reasonable exception has been ingrafted, that if the injured party, by his own negligence, has contributed to the injury, he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent in law to a willful injuring. I do not think this exception, or any reasonable extension of it, can be applicable to the plaintiff. He was a passenger on the Harlem cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, but is mere fiction. The doctrine contended for is stated, and in a measure sustained by the decision in *Thorogood v. Bryan*, 8 Com. B. 115. That was an action by a passenger in an omnibus against the proprietors of another omnibus, by which the plaintiff was injured. Wishing to alight, he did not wait for the omnibus to draw up to the side of the street, but got out while it was in motion, and far enough from the foot-path to allow another carriage to pass between it and the path. The other omnibus, coming up, ran over him. The jury were told that if they thought want of care on the plaintiff's part, or on the part of the driver in not drawing up to the side of the street to put the plaintiff down, had been conducive to the injury, no recovery could be had. Before the decision of this case, *Catlin v. Hills*, 8 Id. 123, was argued, an action by a passenger on a steamboat against the

proprietors of another steamboat, between which a negligent collision took place, whereby the passenger was injured. In the course of these discussions, *Bridge v. Grand Trunk Railway Company*, 3 Mee. & W. 244, was also considered, in which the doctrine in question seems to have originated. Judgment was not given in *Callin v. Hills*, *supra*, an arrangement between the parties having taken place, but in the first case mentioned the ruling at the trial was maintained. It seems to have been put on the ground that the plaintiff, having voluntarily trusted himself on the omnibus, had so identified himself with its management that the driver's negligence would deprive him of any right to an action against the owners of the other vehicle. Upon the facts of that case, where the driver's negligence consisted only in his not preventing the plaintiff from getting out until he had drawn up to the foot-path, there was great room to say that it was as much attributable to the plaintiff as to the driver. But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff had no control, no management, even no advisory power, over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception, which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice.

The judgment should be affirmed.

SELDEN and STRONG, JJ., took no part in the decision.

All the other judges concurred.

Judgment affirmed.

DOCTRINES OF CONTRIBUTORY NEGLIGENCE: See note to *Damont v. N. O. C. R. R. Co.*, 61 Am. Dec. 217; *Murch v. Concord R. R. Corporation*, Id. 631; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323, and notes 327; note to *Zemp v. Wilmington etc. R. R. Co.*, 64 Id. 771; *Little Schuylkill etc. Co. v. Norton*, Id. 672; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 409, note; *Vicksburg etc. R. R. Co. v. Patton*, Id. 552, and notes 574; note to *Daley v. Norwich etc. R. R. Co.*, 68 Id. 421; *Adams v. Wiggins Ferry Co.*, 72 Id. 247; *Reeves v. Delaware etc. R. R. Co.*, Id. 713, and note 720. Negligence or fault of plaintiff remotely connected with injury will not prevent him from recovering damages therefor against a defendant whose negligence has been the immediate and proximate cause of the injury: *Vicksburg etc. R. R. Co. v. Patton*, 66 Id. 552, and notes 574; *Iebell v. N. Y. etc. R. R. Co.*, 71 Id. 78, and note 89.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A passenger injured by a collision resulting from the concurrent negligence of two railroad corporations may recover against both or either: *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 483; S. C., 3 Hun, 198; *Pollett v. Long*, 56 N. Y. 205; *Robinson v. N. Y. C. & H. R. R. Co.*, 65 Barb. 154; *Lannen v. Albany Gas Light Co.*, 46 Barb. 270; *Brehm v. Great W. R'y Co.*, 34 Id. 274. But in *Chipman v. Palmer*, 77 N. Y. 51, S. C., 9 Hun, 517, the principal case was considered, and it was held that one of several tort-feasors was not liable for the acts of those with whom he was not acting in concert; and that an action would lie against one or all of them where a direct personal injury is occasioned by the concurring negligence of two or more parties at one and the same time, but not where the injury is remote from the act, and the result of different acts of different parties at different times, without any association and independent of each other. The principal case is distinguished in *Bronk v. N. Y. & N. H. R. R. Co.*, 5 Daly, 457. In the latter case, the plaintiff was not a passenger on defendants' train. A passenger by railroad is not so identical with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part, and can recover for personal injuries from a collision through negligence of the defendant, although there is such negligence contributing to the collision on the part of the train conveying him as would defeat an action by its owners: *Arctic Fire Ins. Co. v. Austin*, 6 Thomp. & C. 66; *Webster v. Hudson River R. R. Co.*, 38 N. Y. 262; *Perry v. Lansing*, 17 Hun, 37. In *Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 597, the court of appeals, however, affirmed the judgment of the court below, although that court had charged the jury that the negligence of the driver must be regarded as the negligence of the passenger, and that she could not recover if his negligence contributed to produce the injury. The principal case was cited at page 601. See *Mooney v. Hudson R. R. Co.*, 5 Robt. 548, which discusses the same question, citing the principal case, p. 549; see also *Beck v. East R. F. Co.*, 6 Robt. 87; *Dyer v. Erie R'y Co.*, 71 N. Y. 234.

CHAUTAUQUE COUNTY BANK v. RISLEY.

[19 NEW YORK, 369.]

JUDGMENT CREDITOR MAY RELY ON LIEN OF HIS JUDGMENT on real property, and on his means of enforcement at law, instead of resorting to equity. Thus, although the debtor has made a prior conveyance, yet the creditor may sell on execution, and the purchaser will have the right of impeaching the debtor's conveyance as fraudulent. And if the creditor's judgment was recovered before other creditors instituted proceedings in equity, nothing in the course or result of those proceedings can affect the rights of the purchaser under the judgment.

APPOINTMENT OF RECEIVER IN CREDITOR'S SUIT does not of itself effect a transfer of the debtor's real property; that is accomplished by a deed from the debtor.

EVIDENCE OF FRAUD AGAINST CREDITORS need not be produced by one who impeaches a deed of land as against a purchaser from a receiver, if the defendant, to show his own title, introduces the decree appointing the receiver and the receiver's deed to him, and these recite that the appointment was made in a suit by other creditors brought on the ground that

the deed was fraudulent. Such recitals estop the purchaser from denying the fraudulent character of the deed.

SUING RECEIVER WITHOUT LEAVE OF COURT only raises a question of contempt; it does not affect the right involved in the suit.

PRESUMPTION IS THAT DEED TO CORPORATION authorized to acquire land for some purposes only was taken by it for a lawful purpose; if the actual purpose was illegal, that must be affirmatively shown.

BANK CHARTER PROVISION AUTHORIZING BANK to hold such real property as should be purchased by it at sales upon judgments, decrees, and mortgages for debts due to it, does not authorize the bank to take an assignment of the right of a purchaser at a sheriff's sale of real property of a judgment debtor of the bank, where such sale was made on an execution on a senior judgment in favor of a third party, and the time for redemption from the sale had passed.

APPEAL from a judgment in favor of defendant on a verdict taken subject to opinion, in an action for recovery of specific real property. The facts appear in the opinion of this court.

C. Tucker, for the appellant.

W. D. White, for the respondent.

By Court, COMSTOCK, J. One Saxton, who is the common source of title, on the first of October, 1837, assigned all his real estate to Crosby and Crane for the benefit of his creditors. Webb and Douglass afterwards, on the fourth of November, 1837, recovered a judgment against him, which was the first in the order of time. On the twenty-eighth of September, 1838, having had their execution returned unsatisfied, they filed their bill in chancery against the assignor and assignees for the purpose of setting aside the assignment, on the ground that it was made in fraud of creditors. On the first of November, in the same year, a decree was pronounced in that suit, declaring the assignment fraudulent and void as to creditors, and directing the assignor to convey the assigned estate to a receiver. He accordingly conveyed to a receiver on the fifth of January, 1839, who subsequently, on the seventh of May, 1840, sold and conveyed the premises in question to one White, under whom the defendant is in possession as tenant. The plaintiff claims title to the same premises by virtue of a sheriff's deed, given in pursuance of a sale made May 30, 1840, under judgment against the same debtor, recovered by one Adams before the filing of that bill, but after the rendition of the judgment above mentioned in favor of Webb and Douglass, which was the foundation of the suit in chancery. Adams was not a party to the bill.

The facts, as thus far stated, present a question of consider-

able importance as to the effect upon the liens of other judgment creditors, where the oldest one proceeds in equity to set aside a prior fraudulent conveyance or assignment, and not only obtains a decree pronouncing it fraudulent and void, but has a receiver appointed, and, through the receiver, has the real estate sold for the satisfaction of his debt. On the part of the defendant, it is claimed that the purchaser from the receiver acquires a title free from the liens which had attached in favor of junior creditors, as well before as after the filing of the bill; a doctrine which, if sound, will give to a bill in equity, in such cases, and to the proceedings thereon, if conducted to a decree and a receiver's sale, all the effect upon subsequent liens which a statutory sale by the sheriff under a judgment can have. A sheriff's sale and conveyance vest in the grantee all the right and title which the debtor had in the land at the time when the judgment first attached as a lien, free from all later incumbrances, and unaffected by any subsequent conveyances or acts. These are consequences which flow from the nature of the lien as declared by the statute, and from the provisions of law concerning the execution and sale, and declaring the effect of the conveyance to be finally given. But the sale is not conclusive before the expiration of a year, during which the debtor, his heirs and grantees, may redeem; nor can the deed be given until three additional months have elapsed, during which other judgment creditors and mortgagees may, in the manner provided, acquire the interest of the purchaser at the sale: 2 R. S. 370, secs. 45 et seq.

If it be determined that a receiver's sale, under proceedings in chancery after a fraudulent conveyance is set aside by the decree, is attended with the same results, the obvious effect in the first place is to cut off the right of the debtor to redeem. This right is secured to him as the judgment debtor by the terms of the statute, notwithstanding he may have parted with all his interest in the land by a prior fraudulent or subsequent honest conveyance: 2 R. S., 370, secs. 45, 46. A consequence more material to the present purpose is, that other creditors by judgment or decree, whose debts are also liens if the debtor's prior conveyance is tainted with fraud, are also deprived of the right secured by law to improve their condition by acquiring the interest and taking the situation of the purchaser at the sheriff's sale. Indeed, if a court of equity can direct a peremptory sale by its receiver, in cases of this kind, and if the

effect of that sale be as claimed, the whole policy of our laws in respect to liens by judgment, and sales to enforce the same, would seem to be subverted.

Such, we are satisfied, is not the nature or effect of proceedings in equity in cases of this description. The appropriate object of a bill in chancery, so far as it relates to lands in which the debtor has a legal estate subject to the statutory lien of judgments against him, is fully obtained when a decree is pronounced clearing away the fraudulent obstruction to the ordinary and legal remedy by execution. If the court, however, proceeds further, and directs first an assignment by the debtor to a receiver, and then a sale by the latter for the purpose of satisfying the debt which is the foundation of the suit, the purchaser will, undoubtedly, acquire a title: *Chautauque Co. Bank v. White*, 6 N. Y. 236 [57 Am. Dec. 442]. I do not question the power of the court, acting upon the person of the debtor, to compel him to assign his estate to a receiver for the payment of the debt. The fraudulent conveyance being annulled by the decree, the receiver, under an assignment to him, takes the title, which he can convey to a purchaser. But the title of the receiver and of the purchaser from him rests upon the debtor's own conveyance, made under the direction of the court, and has no relation to the judgment. When the creditor takes this course, instead of falling back upon his legal remedy, he abandons the lien of his judgment, and seeks a satisfaction of his debt out of the debtor's property generally. The personal estate becomes vested in the receiver from the time and by virtue of his appointment; the real estate only by virtue of a conveyance to him which the court has power to compel; and in this way the satisfaction is worked out. If several judgment creditors are thus proceeding in equity, either in one or in several suits, the same receiver is appointed for the benefit of all of them. If real estate on which their judgments are liens is sold, the proceeds will be shared amongst them according to their priorities. But all who thus proceed make their election between the two modes of procuring payment of their debts, one by enforcing specifically and in the mode provided by law the liens of their judgments; the other by procuring an estate charged with those liens to be sold in another manner and by another instrumentality for the payment of the same debts. A debtor's conveyance of his real estate to a receiver, although it may be compulsory, is in its nature simply and purely the creation of a trust for the

payment of the debts on which the proceedings in equity are founded. The receiver is the trustee, and discharges his duty under the direction of the court. The creditors at whose instance the trust is created, for whose benefit the trust fund is sold, and who take its proceeds, most certainly can never afterwards seize upon and sell the same estate or fund by virtue of a prior legal lien. A pretension to any such right on their part would be repelled by the superior right of the purchaser to enjoy the estate free from the incumbrance of debts, to satisfy which it had been sold.

But no creditor having a statutory lien by judgment can be compelled to take the equitable remedy. He may, if he prefer, stand upon his lien and the means which the law has given him of enforcing it. If his debtor has made a prior fraudulent conveyance, he may, nevertheless, sell upon his execution, and the purchaser will have the right and will take the risk of impeaching such conveyance. If his judgment has been recovered before other creditors have instituted proceedings in equity, nothing in the course or in the result of those proceedings can affect his rights. A *lis pendens* filed with the bill, or actual notice of the suit, may perhaps subject all judgments afterwards recovered to any decree which shall be made, and render them subordinate to a receiver's sale. The title derived from the receiver rests, as we have seen, on the conveyance of the debtor, which the court compels him to make, and it must, therefore, in the absence of actual or constructive notice of the suit, be a title subject to all liens existing at the time of that conveyance in favor of persons who are in no way connected with the proceedings; and in no case can such title relate to any period of time anterior to the filing of the bill so as to affect the legal rights of persons who do not voluntarily waive them by uniting in that remedy. To determine otherwise would be to convert a creditor's suit into a species of execution on the judgment for the specific enforcement of the lien; so that a title confessedly based on the debtor's own conveyance to an officer of the court may relate back to the period when the judgment became a lien. For this conclusion there is no principle, and no precedent can be found in the books.

We have been referred to cases showing that any attempt, by a person having an outstanding right or title, to disturb the possession of a receiver is a contempt of the court of chancery. All the doctrine on this subject which is pertinent to the present question may be seen by referring to the case of *Angel v.*

Smith, 9 Ves. 335. The cause in chancery coming on for further directions, it appeared that an ejectment had been brought, without leave of the court, for lands in the possession of its receiver. The lord chancellor observed that the practice was to ask leave, and he "cautioned the solicitor that he would proceed at his peril." Mr. Richards then mentioned an instance in which the party was very nearly committed by Lord Thurlow. In consequence of these intimations, a motion was made the next day for leave to try the ejectment, and after a great deal of discussion, leave was given. In all the discussion, no doubt was suggested that a prior legal title would prevail against a receiver's possession. The questions considered were, whether leave must be asked, and whether, in that particular case, it should be granted. If not asked, it was considered that the party might be in contempt, because the court of chancery thought itself competent to examine the title, and would permit the party claiming to be examined *pro interesse suo*. The lord chancellor said: "It is clearly a contempt of this court to disturb sequestrators;" "consider the consequence. How are sequestrators to defend their possession against an ejectment?" The same rules, he thought, applied to receivers, whose possession, he said, might be disturbed whenever there was a legal right; but the court would examine that right before granting leave, to the party claiming it, to proceed. Now, in this practice of the court of chancery, I see nothing even to suggest a doubt of the validity of a title acquired by sale under a judgment, which is a legal lien upon the land sold prior and paramount to the title or possession of a receiver. It may be that the creditor should ask leave of the court of chancery before he proceeds to sell, or that the purchaser acquiring the title should make a like application before he brings his ejectment. If, however, he fails to do so, the question is merely whether the court will consider him in contempt, and punish him accordingly. The sale itself is but the assertion of a legal right, and it cannot be illegal and void on the ground that the leave of an equitable tribunal is not first asked and obtained. It may be that the case of *Wiswall v. Sampson*, 14 How. 52, in the supreme court of the United States, goes to the extent of laying down a different doctrine. If so, we are constrained to say that we cannot follow that decision.

The result is, that White, by the decree in the chancery suit annulling the debtor's fraudulent assignment, and by the receiver's sale and conveyance, acquired a title to the premises

in question, subject to the lien of judgments docketed prior to the commencement of that suit in favor of persons not parties thereto. On one of those judgments the sheriff sold, and the plaintiffs have the conveyance under that sale. They are, therefore, entitled to recover the premises, so far as we have yet examined the case.

It has been argued, however, that on the trial the plaintiffs did not support their title by proving that the debtor's conveyance to assignees, prior to all the judgments, was fraudulent. That proof was made by the defendant. The plaintiffs, having shown the judgment and their title under the sheriff's sale, were *prima facie* entitled to recover. The defendant then proved his title under the proceedings and decree in chancery at the suit of Webb and Douglass, and under the assignment to the receiver, and the sale by him. The decree adjudged and determined that the prior assignment was fraudulent and void; and the receiver's conveyance to White recited the suit in chancery and the decree. The defendant's title depended, therefore, on the fact that the assignment had been made in fraud of creditors; and having thus proved the fact in his own favor, he could not allege that it was not true in respect to the plaintiffs. The recitals in the deed, under which he held, estopped him from making that allegation. This, I think, is a plain proposition; and the law was considered to be so by the former supreme court, when the case was before it some twelve years ago: *Chataque Co. Bank v. Risley*, 4 Denio, 480.

Proceeding now to questions of a different character, it appears that the three judgments first recovered against Saxton, the debtor, were these: 1. The one in favor of Webb and Douglass, in which the bill in chancery was filed; 2. One in favor of Porter, docketed May 7, 1838; 3. One in favor of Adams, docketed July 28, 1838; all being prior to the commencement of the chancery suit. The sheriff's sale which has been mentioned was on the Adams judgment, and White was the purchaser, as before stated. Before the expiration of fifteen months, one Chauncey Tucker procured an assignment of the Porter judgment, and then as assignee of that judgment took the necessary steps to redeem or acquire the interest of White, as purchaser at the sheriff's sale. Tucker then assigned his interest to the plaintiff's bank, which received the sheriff's deed, that being the title under which they claim to recover. At the time White bid off the premises at the sheriff's sale (May 30, 1840), he had acquired the title and was the owner

of the premises under the receiver's sale and conveyance, as already shown. Upon these facts the question is presented, whether White, being the owner, subject, as we have seen, to the lien of the Adams and Porter judgments, is to be regarded as a purchaser at the sheriff's sale, so that in that capacity he could take the deed and acquire an older title under the Adams judgment, or whether his bid and the payment thereof are to be regarded as so much money paid by him in extinguishment of a lien which, as owner of the land, he had a right to pay off and discharge. If it is to be regarded as a sale with the usual incidents, then Tucker could acquire the interest of the purchaser as redeeming judgment creditor, and the bank, as his assignee, could receive a valid and effectual conveyance from the sheriff. If the bid of White is to be considered a simple payment, or if his interest as purchaser is to be deemed merged in his title the moment he acquired it, then the plaintiffs have no ground to stand upon, and the defendant's title through the receiver must prevail.

We see no reason thus far to doubt the efficacy of the sheriff's sale, or the validity of the conveyance to the plaintiffs in pursuance thereof. We discover no difficulty or incongruity in conceding to the owner of the fee, not being himself the judgment debtor, the right to become a purchaser under a judgment which is a lien upon his land. He purchases, it is true, in a certain sense, his own land, but the sale is under a charge which is an incumbrance senior to his title, and he ought to enjoy the right of attempting in this manner to improve his condition; especially if there be other liens outstanding which he is under no obligation to pay. The true difficulty, if there be any, would seem to arise out of some of the analogies of the law of merger. But we think that a merger of the special interest acquired by purchase at the sheriff's sale does not occur in such a case. That interest, it is true, during twelve months from the sale, is but a specific lien for the sum bid, in the sense that it is defeasible on a redemption within that time. But in another sense, it is an inchoate title paramount to the one already possessed by the purchaser, and ripening, by lapse of time merely, into an absolute estate. There is some difficulty, therefore, in calling it a lesser estate liable to sink into the greater. In the sense last suggested it is a higher estate, defeasible on a condition subsequent, but which, if unredeemed from within a prescribed period, will absorb and subvert the other. It is, moreover, to be observed, that a

sale being made under a judgment, certain incidents and rights attach in favor of other parties, which are lost if the interest of the purchaser is deemed to merge in his title. The statute provides that other creditors having liens may acquire the interest by proceeding in the manner provided. Our conclusion is, that Mr. White took and held such an interest by his purchase under the Adams judgment, that Tucker could acquire it as a creditor having a lien under the judgment in favor of Porter.

Tucker, after the lapse of fifteen months from the time of the sale, assigned all his rights to the plaintiffs by a written instrument under seal, and expressed in general terms to be "for value received." There is no other proof in the case of the consideration upon which that assignment was made. The plaintiffs are a banking corporation having a special charter, and the question arises whether that purchase from Tucker is to be regarded presumptively as made within the power conferred upon them of acquiring real estate. I say the purchase from Tucker, because when he made the transfer to the plaintiffs the sheriff's sale had matured, and the conveyance was in judgment of law absolutely due. The conveyance itself was a formal act remaining to be done, which the plaintiffs were entitled, as of course, to have performed in their favor, provided their purchase of Tucker's right was an authorized and valid transaction. The question is therefore precisely the same as it would be if the bank had received a formal conveyance of real estate from any other party, the consideration clause being expressed in the words "for value received," without any other proof of the circumstances or of the consideration to bring the purchase within, or to place it without, the powers of the corporation.

The plaintiffs' bank was authorized by its charter to purchase, hold, and convey real estate as follows: 1. Such as should be necessary for its immediate accommodation in the convenient transaction of its business; 2. Such as should be mortgaged to it as security for loans, etc.; 3. Such as should be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; 4. Such as it should purchase at sales under judgments, decrees, or mortgages held by it: Laws of 1831, c. 181. In this case, the purchase from Tucker was not under any judgment, decree, or mortgage. His title, as we have seen, had been derived from a sale under a judgment. But the transactions between him and the plaintiffs were not

of that nature. Their purchase from him was of the same character as though he had acquired title in any other mode. They were strangers to the sheriff's sale, although they took the deed by the authority of their immediate grantor or assignor. It follows that their right to take and hold the real estate in question can only be maintained on the presumption that it was necessary in the convenient transaction of their business, or that it was taken in satisfaction of a debt previously contracted. The premises were a small lot of land in the village of Fredonia. I find no proof in the case showing whether the lot was or was not wanted by the plaintiffs for a banking-house, or whether the transfer from Tucker was or was not taken in satisfaction of a debt due from him. In respect to the consideration, the words "for value received," contained in that transfer, may be referred with equal propriety to a present value paid down, or to a debt previously existing, in satisfaction of which the assignment was made. The generality of the expression obviously may include value of any description. Quite consistently, therefore, with what we know of the transaction, the bank may have acted within its powers, or it may have exceeded those powers, and violated its organic law.

The dealings of a corporation, which on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized, without some evidence tending to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men. A different doctrine would require a corporation, even in many of its ordinary transactions, to show that it had not transcended the limits of its charter. Such a rule, I am confident, has never been laid down; and its policy may well be denied, when we consider how much of the business of the community is carried on by associated capital, and how many titles may be endangered if mere presumptions are allowed against the lawfulness of such dealings. A corporation having no general authority to lend money and discount notes may, nevertheless, be the holder of a promissory note, and attempt to enforce it. In such a case, it will be presumed that the note was taken for a debt contracted in the course of some lawful dealing: *New York Firemen's Ins. Co. v. Sturges*, 2 Cow. 664. In *Safford v. Wyckoff*, 4 Hill, 442, the action was against a

banking association upon a draft or bill of exchange. Chancellor Walworth, while dissenting on another ground from the judgment of the court of errors in favor of the plaintiffs' right to recover, observed: "Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show for what the particular security was given, if there is nothing on the face of the instrument itself to create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose, rather than for one which was unauthorized and illegal." In *Farmers' Loan and Trust Co. v. Perry*, 3 Sandf. Ch. 339, and *Farmers' Loan and Trust Co. v. Clowes*, 3 N. Y. 470, the bill was filed to foreclose a mortgage given by the defendant to the plaintiffs. The plaintiffs, as a corporation, had no general authority to make loans, and invest their capital on bond and mortgage, but it could execute trusts, and as incidental to that power, could invest trust funds in securities of that nature. It was held by Assistant Vice-Chancellor Sandford, and by this court on appeal, that where a loan by such a corporation was contested by the borrower on the ground of a want of power to make it, it rested on him to show affirmatively that the loan was not made in the proper exercise of the powers expressly granted.

I can see no reason why the principle of these authorities should not be applied to the question under consideration. The plaintiffs' bank had, it is true, no general authority to deal in real estate, but it could take and hold lands for specified purposes, and for specified considerations. The terms of the conveyance to them are consistent with the powers thus granted. The presumption is in favor of their title, because there is nothing to impeach it; and this presumption rises into greater importance and value when we consider that if the opposite one be allowed, it may overthrow titles of this nature transmitted to other hands, and when the lapse of time may have impaired or destroyed the means of sustaining them.

One or two other points require only a brief consideration.

The plaintiffs were themselves creditors of Saxton, and it appears (so I assume, for argument's sake) that they, as preferred creditors under the fraudulent assignment, received from the assignees certain payments on their debt in the year 1838. On this ground, it has been claimed that they cannot assert their title now in question, which is hostile to that assignment. To this it is a sufficient answer that the plaintiffs hold simply as purchasers from Tucker, whose title, derived in the manner

already stated, was affected by no estoppel or consideration of this nature.

It has also been claimed that the adjudication in the equity suit of these plaintiffs, the Chautauque County Bank, against White, the defendant's landlord, reported in 6 N. Y. 236 [57 Am. Dec. 442], is a bar to the present action. But it appears that the subject of litigation in that suit did not embrace the premises now in question. The plaintiffs claimed other lands to which they could not be entitled unless two judgments recovered by them against Saxton became liens thereon. But those judgments were recovered two days after Saxton assigned, as above stated, to the receiver, and the point determined was that the assignment transferred the title to the receiver so that those judgments never were liens. Upon these facts, it is obvious that the decision and decree can have no influence upon this case.

It appears that White, for the purpose of preventing Tucker from using the Porter judgment to redeem or acquire his interest as purchaser at the sheriff's sale on the twenty-sixth of August, 1851, paid to the attorney by whom that judgment had been recovered the amount due thereon. White, as owner of the land under the receiver's sale, had undoubtedly a right to pay off and discharge all liens which incumbered it. The claim of a judgment creditor to use his judgment as the foundation of the proceeding to redeem from a sale by the sheriff is clearly subordinate to the right of the debtor or of the owner of the estate to disincumber it by paying the judgment. But the payment made to the attorney was unauthorized, more than two years having elapsed since the recovery of the judgment, and it has not been pretended that the lien was discharged by that payment. It seems, also, that the attorney offered to pay the money over to Tucker, as assignee of the judgment, before the latter took the steps to redeem. But Tucker refused to take the money, insisting that the attorney had received it without authority. This offer could have no effect as a tender, because it was not made by the authority of White; the latter left no instructions with the attorney to tender the money to Tucker. It becomes unnecessary, therefore, to determine whether a tender properly made will discharge the lien of a judgment. It seems, however, to be held both by the late supreme court and court of errors that such is not the effect of mere tender: *Jackson v. Law*, 5 Cow. 248; S. C., 9 Id. 641.

We are of opinion that the judgment of the supreme court must be reversed, and that judgment must be rendered for the plaintiffs on the case made for the opinion of that court.

JOHNSON, C. J., and DENIO, STRONG, and GROVER, JJ., concurred in this opinion.

SELDEN, J., took no part in the decision.

ALLEN and GRAY, JJ., were for affirmance, on the ground that it was not shown and could not be presumed that the plaintiff acquired Tucker's title under either of the clauses of its charter authorizing the purchase of real estate.

Judgment reversed, and judgment for the plaintiff ordered.

CREDITOR WHO OBTAINS JUDGMENT ACQUIRES LIEN THAT BINDS ESTATE OF JUDGMENT DEBTOR against any subsequent act of the latter, but he acquires no interest or estate in the property: *Davis v. Ownsby*, 55 Am. Dec. 105; *Dunham v. Cox*, 64 Id. 460. And property fraudulently conveyed may be reached on execution: *Stewart v. McMinn*, 39 Id. 115, and note 117; *Ross v. Story*, 44 Id. 121; *Abney v. Kingsland*, Id. 491. Judgment creditors may, however, before the issuance of execution, maintain a bill in equity to remove fraudulent incumbrances placed by a debtor on his property, in order that such property may be appropriated, free from such fraudulent incumbrances, to the satisfaction of the creditor's judgment; but the creditor must first show that the fraudulent disposition of the property embarrasses him in obtaining satisfaction of his debt, and facts must be stated from which at least it may be inferred that the aid of a court of equity is required to give the judgment its legal and full effect: *Dunham v. Cox*, 64 Id. 460, and cases cited in note to same 464, on right of creditors to impeach conveyances fraudulent as to them.

APPOINTMENT OF RECEIVER, EFFECT OF, ON TITLE: See *Chase's Case*, 17 Am. Dec. 277; *Porter v. Williams*, 59 Id. 519.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Personal property passes to the receiver without assignment: *Barnes v. Morgan*, 6 Thomp. & C. 108; S. C., 3 Hun, 705. Where the property fraudulently conveyed by the debtor is real estate, and an action is brought to set aside the conveyance, the court has power to order a transfer to a receiver: *Cole v. Tyler*, 65 N. Y. 77. This is particularly true where the property is so situated that it cannot be sold on execution, and in such a case the court will, through the receiver, appropriate the property to the payment of the judgment: *McCaffrey v. Hickey*, 66 Barb. 492. But a debtor's conveyance of his real estate to a receiver, although it may be compulsory, is, in its nature, simply and purely the creation of a trust for the payment of the debts on which the proceedings in equity are founded. The receiver is the trustee, and discharges his duty under the direction of the court: *Elsworth v. Muldoon*, 46 How. Pr. 249; S. C., 15 Abb. Pr., N. S., 444. As to some classes of property, the receiver's title commences from the filing of the order directing the appointment of a receiver. It relates back to the date of such order, overreaching all intermediate liens: *Clark v. Brockway*, 1 Abb. App. Dec. 354; S. C., 3 Keyes, 15; *Moak v. Coats*, 33 Barb. 501. This is true of

the debtor's personal estate, but the title to his real estate is transferred only by force of the debtor's own conveyance, which the court has power to compel him to execute: *Scott v. Elmore*, 10 Hun, 71, 72; *Union Nat. Bank v. Warner*, 12 Id. 310; *Dawley v. Brown*, 65 Barb. 120; *Moak v. Coats*, 33 Id. 501. After receiving the debtor's deed, the receiver may also sell and convey the real estate of the debtor: *Walker v. White*, 36 Id. 599.

The more usual judgment to be entered in cases of fraudulent dispositions of real estate is to declare the conveyance fraudulent and void as against the creditor and his judgment, with the necessary and appropriate formalities in that regard, leaving the latter to enforce his judgment in the usual way, by execution. But the court may also, in the exercise of its common-law powers, appoint a receiver and direct and enforce a conveyance to him by the party or parties having the apparent or legal title, and vest him with the power of sale, and with the application of the proceeds. But this latter course of practice is not always safest, for in that case the purchaser at the receiver's sale must trace his title through the conveyance to the receiver, which might, as in the principal case, let in other liens which attached subsequent to the judgment, which was the foundation of the creditor's suit, to defeat his title: *Union Nat. Bank v. Warner*, 12 Hun, 309; *Erickson v. Quinn*, 15 Abb. Pr., N. S., 168. A sale of realty by a receiver in such cases will not give a title good against valid liens existing prior to the filing of the complaint. But where the holder of a lien, or claimant of other interest in the premises, is made a party to the suit, and the validity of his lien or claim is made a question therein, and is adversely disposed of by the judgment, a sale and conveyance by the receiver will vest in his grantee a title superior to that lien or claim: *Shand v. Hassley*, 71 N. Y. 324. A judgment creditor has a right, notwithstanding a subsequent assignment for the benefit of creditors, to bring an action to set aside his debtor's fraudulent conveyance of land: *Taft v. Wright*, 2 Thomp. & C. 618; S. C., 47 How. Pr. 9. Where defendant himself gives in evidence a judgment which shows an assignment to be fraudulent and void, he will be concluded upon that question: *Becker v. Torrance*, 31 N. Y. 635. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sue under his execution, and the purchaser will have the right to impeach the conveyance in an action at law to recover the premises. He may, but he is not bound to, file a creditor's bill to set aside the conveyance: *Bergen v. Snedeker*, 8 Abb. N. C. 58.

If a judgment creditor's judgment has been recorded before other creditors have instituted proceedings in equity, nothing in the course or in the result of those proceedings can affect his right: *Scott v. Elmore*, 10 Hun, 71. A judgment creditor having a lien by statute is not bound to go into a court of equity to have a conveyance made by his debtor declared fraudulent. He may, if he prefers, stand upon his lien, and sell the land under his judgment, and the purchaser under the execution can impeach the conveyance in an action at law brought for the recovery of the land: *O'Brien v. Browning*, 49 How. Pr. 113; *Warden v. Browning*, 12 Hun, 499. The acts of a corporation must be presumed valid until the contrary is shown. The dealings of a corporation, which on their face or according to their apparent import are within its charter, are not to be regarded as illegal or unauthorized without some evidence to show that they are of such a character: *Cheever v. Gilbert Elevated R'y Co.*, 11 Jones & S. 484; *Kent v. Quicksilver Mfg. Co.*, 78 N. Y. 183; *Lindsey v. Simonds*, 2 Abb. Pr., N. S., 73. So lands acquired by a railroad company under authority of law will be presumed to have been law-

fully acquired, and for a lawful purpose: *Yates v. Van de Bogert*, 56 N. Y. 530. The judgment debtor has a right to redeem by the terms of the statute, notwithstanding he may have parted with all his interest in the land: *Livingston v. Arnoux*, Id. 515; *Bowers v. Arnoux*, 1 Jones & S. 537. In connection with this question of redemption, see *Erickson v. Quinn*, 3 Lans. 304; *Watson v. N. Y. Cent. R. R. Co.*, 6 Abb. Pr., N. S., 96; in both of which the principal case is cited, and in the last of which it is said that equity favors this right of redemption. The principal case was distinguished in *Orr v. Gilmore*, 7 Lans. 346; *Wing v. Desse*, 15 Hun, 194, where it was also commented upon; *Warden v. Browning*, 12 Id. 500. It was cited in *Foster v. Townshend*, 12 Abb. Pr., N. S., 471, to show that much controversy has existed on the subject of the peculiar power of a receiver under a creditor's bill. Since the code, the appointment of a receiver in proceedings supplementary to execution vests in the receiver all the property, both real and personal, of the judgment debtor, without any assignment: *Hayes v. Buckley*, 53 How. Pr. 187, making an unimportant citation of the principal case.

HOME INSURANCE COMPANY v. GREEN.

[19 NEW YORK, 512.]

NOTICE OF DISHONOR OF PROMISSORY NOTE must name the maker or it will not suffice to charge the indorser.

APPEAL from a judgment of the Buffalo superior court against an indorser of a promissory note. On the trial, the plaintiff offered the evidence usual in actions by indorsee against indorser, but the defendant's counsel objected that the notice of non-payment which had been served on the indorser was not sufficient to charge him, because it did not give the maker's name; the entire description given of the note being as follows: "A note, dated Buffalo, June 18, 1855, for eleven hundred and fifty-one dollars, drawn by _____, payable at three months date, and indorsed by you." The objection was overruled, and the plaintiff had judgment.

O. O. Cottle, for the appellant.

John Ganson, for the respondent.

By Court, DENIO, J. I am of opinion that the notice was not sufficiently certain. The most descriptive feature of a note is the name of the maker. The date, amount, and time of the payment, and the statement that the party served with the notice was an indorser, might or might not recall it to his recollection. One indorsing frequently for the accommodation of different persons, and keeping no bill-book, would not, by means of such a notice, ordinarily be able to identify the paper

on which he was sought to be charged; nor would one who indorsed and negotiated his own business paper, if his transactions of that kind were extensive, be much more likely to know what particular paper had been dishonored.

Several cases have been decided upon imperfect notices. In *Shelton v. Braithwaite*, 7 Mee. & W. 436, one who had indorsed a bill, and had himself received notice of dishonor from the holder, wrote to his drawer: "I have received an intimation from the B. and M. Bank that your draft on A B is dishonored." This was held sufficient, though it did not mention the date, amount, or time of payment, there being no evidence of any other bill to which the letter could apply. In *Cayuga County Bank v. Warden*, 1 N. Y. 413, the notice described the note as one for three hundred dollars instead of six hundred dollars, the true amount; but the latter sum was put down in the margin. It did not state a presentment for payment, but only that it had been protested. It being shown that there was no other note in existence, to which the notice would apply, it was held sufficient: S. C., 6 N. Y. 19. In *Youngs v. Lee*, 12 Id. 551, the notice stated the name of the maker and amount, and that the note was indorsed by the person served, but was silent as to the date and time of payment; and it was held that the defendant was duly charged.

None of these cases, I think, justify the judgment in this case. It is true that no precise form is necessary for these notices; but they must reasonably apprise the party of the particular paper upon which he is sought to be charged. If so much is not required, the giving of any notice is a useless formality. This notice does not satisfy that requirement.

I am of opinion that the judgment should be reversed.

STRONG and ALLEN, JJ., expressed no opinion.

All the other judges concurred.

Judgment reversed, and new trial ordered.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: No precise form is necessary in a notice of dishonor of a promissory note, but the notice must reasonably apprise the party of the particular paper upon which he is sought to be charged: *Artisans' Bank v. Backus*, 3 Abb. Pr., N. S., 279; S. C., 36 N. Y. 106; *Bank of Cooperstown v. Woods*, 23 Id. 559; *Gates v. Beecher*, 60 Id. 527. The names of the makers of a note is the most descriptive feature of a note: See case last cited.

BRIGGS v. DAVIS.

[20 NEW YORK, 15.]

RECONVEYANCE TO GRANTOR OF ESTATE WHICH HAD BEEN CONVEYED IN TRUST for the benefit of creditors, by instrument reciting the complete execution of the trust, when, in fact, the objects of the trust have not been completed, some of the creditors being still unpaid, is, under the New York statute, void and in contravention of the trust; and a mortgagee in good faith, after such reconveyance, having only constructive and not actual notice of such trust, will take subject to the execution of the trust, and is entitled to redeem the land by satisfying the claims of the *cestuis que trust*.

MORTGAGEE OF LAND, AFTER CONVEYANCE THEREOF IN TRUST for the benefit of creditors, though a proper, is not a necessary, party to an action by the beneficiaries of the trust to enforce its execution.

BILL for cancellation of mortgage. The facts elicited on the trial were that one Masten, being the owner of the property in controversy, executed a conveyance of all his property to Dorman, Robinson, and Van Buren, in trust to sell the same for the benefit of his creditors. The trust was partially executed when the trustees executed a reconveyance to the grantor of all property which had not been disposed of in pursuance of the trust, the instrument of reconveyance reciting that the objects of the trust had been accomplished, when in fact there were debts still due which had not been paid. Thereon the grantor executed to the North American Trust and Banking Company, in whose place the defendant in this action as receiver had been substituted *pendente lite*, the mortgage which it is the object of this suit to set aside and cancel. The special term rendered a judgment canceling said mortgage, and perpetually enjoining all persons claiming thereunder from foreclosing said mortgage. The general term affirmed the judgment. Defendant appealed. The decision of the supreme court is reported in 20 Barb. 393. The further facts appear in the opinion.

B. W. Bonney, for the appellant.

David B. Prosser, for the respondent.

By Court, **DENIO, J.** It was a rule in courts of equity, before the revision of the statutes, that the interest of the beneficiary in a trust in lands could not be affected by any act of the trustee in favor of a party having notice of the trust; and by our recording acts, every purchaser and incumbrancer is chargeable with notice of all conveyances made by parties under whom he derived title, which have been recorded according

to the statute: *Shepherd v. McEvers*, 4 Johns. Ch. 136 [8 Am. Dec. 561]; *Beekman v. Frost*, 18 Johns. 544 [8 Am. Dec. 246]. This rule, so far as it applies to the present case, is now matter of positive law, the statute respecting trusts having declared that "where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees in contravention of the trust shall be absolutely void:" 1 R. S. 730, sec. 65. It is unnecessary now to inquire whether, notwithstanding the strong language of the act, such a sale would not be supported between the parties to it and their privies in estate, if the beneficiaries of the trust should not assert their rights; for the plaintiff here claims to hold under the creditors, who were the parties interested in this trust. If he is right as to the effect of the legal proceedings which resulted in the sale to him, he is in the most favorable position which he could occupy to avail himself the protection afforded by the statute.

This view was answered by the counsel for the defendant attempting to maintain that the reconveyance of the surviving trustee to Masten was, in some proper sense, an act in the execution of the trust, and not one subverting and destroying it. When a trust of lands is fully executed, the legal estate of the trustee is at an end: 1 R. S. 730, sec. 67. Where this is the case, there is strictly no necessity of a reconveyance, for the estate of the trustees ceases by operation of law. It is doubtless a convenient practice, when the purposes of a trust have been consummated, that the party to whom the estate in that event belongs should have written evidence of the fact under the hands of the trustees. But their deed operates rather as the declaration of a fact peculiarly within their knowledge, and as to which their statement would generally be received, than as an authentic legal act or the conveyance of an estate. If when, in a trust of this character, the debts are paid, the estate of the trustees ceases, there is nothing whatever for them to convey. But if this were otherwise, and if it were one of the operative trusts in this assignment to reconvey the residue of the estate to Masten or his heirs, after they should have sold enough to pay the debts, a reconveyance leaving the debts unpaid would be an act in contravention of the trust. A party about to take a title under such a reconveyance, with a knowledge of the terms of the trust, would know that it was an essential prerequisite to the validity of the deed that the trusts should have been actually per-

formed. There is no principle which substitutes the declaration of the trustees, however solemnly made, in place of the fact which could alone authorize them to reconvey. The purchaser, if he would be safe, must not content himself with the recital that the trusts have ceased, but must ascertain at his peril whether such is the case: *Swarthout v. Curtis*, 5 N. Y. 301 [55 Am. Dec. 345]. The statute avoids all deeds which are in truth in contravention of the trust, and there is no exception in favor of such as are fraudulently made to appear in consonance with it by means of untrue statements inserted in them. We have been referred to the statutory provision declaring that the title taken under a trustee authorized to sell is not to be impeached on account of the misapplication of the money paid for such title by the trustees: 1 R. S. 730, sec. 66. The conveyances here upheld are such as are made in fact and in form in pursuance of the trust, and where the only fault is the subsequent misconduct of the trustees in embezzling or misapplying the money; and I conceive that the enactment has no application to a case like the present.

The defendant founds himself upon a familiar doctrine of equity, that a *bona fide* purchaser for a valuable consideration who acquires the legal title shall be protected against a prior equity of which he had no notice. Where the parties have an equal equity, the one who holds the legal title is considered as having the better right. This is a principle of great practical importance in England; and it obtains equally here, though its application is less frequent on account of the abolition of formal trusts, and our practice of recording conveyances and incumbrances, whether they accompany the legal title, or are what the common law would regard as equitable interests, and of the constructive notice which, by the statute, the record of such conveyances afford. There is a remarkable case reported in 3 Myl. & K. 581 (*Jones v. Powles*), which illustrates the rule, and shows to what extent it is carried. John Jones, the owner of a freehold estate, borrowed money upon it and executed a mortgage, but before anything else occurred he paid it off; but the mortgagee did not execute a reconveyance. With us the title conveyed by the mortgage would be extinguished at law as well as in equity. But there, as is well known, it is otherwise. John Jones died, and one Meredith produced a will, by which, if genuine, Jones devised to him all his real and personal estate. Meredith went into possession, and borrowed money of Hall and procured the mortgagee of

the satisfied mortgage to join with him in the mortgage deed, which, however, recited the fact of the satisfaction of that mortgage. The defendant derived her title from Hall. She had made further advances, and had taken a conveyance of the estate. It was afterwards discovered that the will was a forgery, and the heir at law of John Jones filed a bill to redeem, if anything was due, and for relief, as heir, on the ground of the falsity of the will. Thus it will be seen that the defendant's claim upon the legal estate was through the holder of the satisfied mortgage, of the payment of which she had notice by the recitals in the deeds under which she claimed, and that all her equity was derived from parties holding under the forged will; and yet it was decided that, having the formal legal estate, and an equity equal to that of the heir at law, she was entitled to prevail against the latter as to all her advances made before she had notice that the genuineness of the will was contested. The opinion of the master of the rolls may be thought to favor the position of the defendant in the present case. He said: "My impression at the opening of the case was that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration, without notice, was impeached by some secret act or matter done by the vendor or those under whom he claimed; but upon full consideration of all the authorities which have been referred to, and the *dicta* of judges and text-writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration, without notice, is impeached by reason of a secret act done, but also to cases where it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence."

I distinguish the principle of that case which carries the doctrine to the greatest length to which it was ever extended from the present, by holding that the legal title vested in the trustees did not pass by the conveyance to Masten; and I think it did not pass, because they could not legally make an operative conveyance, except in the execution of the trust, and the deed to Masten was not in the execution of the trust, but in disaffirmance of it. It was in hostility to it, and if opera-

tive, it subverted and put an end to it, though its objects were not accomplished. It was precisely such a conveyance as the statute referred to by the terms "conveyances in contravention of the trust." The mandate of the statute that such conveyances shall be absolutely void forbids us to hold that they shall pass the legal estate which was vested in the trustees for the purpose of tacking equitable interests to it, or for any other purpose. I repeat, therefore, that this reconveyance, upon the facts which were established on the trial, was inoperative as against the creditors of Masten, and that they were, notwithstanding, entitled to have the land embraced in it subjected to sale for the payment of their debts.

The remaining inquiry relates to the effect of the action in the court of chancery, and of the final judgment in that action in the supreme court in equity. I have examined these proceedings with a disposition to find some means by which the mortgage to the trust company could be sustained, being convinced that it was taken in good faith, and without the neglect of any ordinary precautions, while Mr. Dorman was not wholly without fault in omitting to bring the premises to a sale, and to settle up the trust in his life-time. The consequence of not making the trust company a party to that action is that it was not concluded as to any matters which were there adjudged. The receiver was at liberty, therefore, to show in the present suit that the recital in the deed of reconveyance was true, and that the title to the premises had actually reverted in Masten by the execution of the trust. This, however, was not proved by the defendant, but, on the contrary, the plaintiff showed affirmatively that a large amount of indebtedness, protected by the second class of the assignment, remained unpaid to the representatives of Dorman when the surviving trustees executed the reassignment. The proof established the position that the reassignment was a void paper. When, therefore, Dorman's administrators filed their bill to enforce the trust, they were under no legal necessity to make the trust company, or its representative, a defendant. It would have been convenient to do so, as all questions might in that way have been determined in one suit. But if the administrators were content to rely upon their ability at any time to show the facts rendering the reassignment inoperative whenever it should be set up, and to convince bidders that it would form no impediment to the title, they were at liberty to compel a sale in execution of the trust without taking any notice of the claim

of the trust company under its mortgage. This is what, in effect, they did do.

Their bill stated the facts necessary to show that the property assigned to the trustees was still liable for the payment of their debt, though the surviving trustees had violated their duty in attempting to convey it to Masten; and although the specific prayer was that Robinson and Van Buren, the surviving trustees, should be adjudged liable to pay them, there was also a prayer for general relief, and the scope of the bill was adapted to a decree which should require the property to be sold for the purposes of the trust. The decree of the chancellor seems to have contemplated an arrangement of the liabilities of the defendants in the action, and of the lands in question, which, if carried out in the final decree, might have produced the satisfaction of the debt without touching the interests which Masten had conveyed to the trust company. According to its provisions, Masten was first to be resorted to. If an execution against him did not raise the amount, then the real estate in his hands, unsold, was to be subjected; and lastly, if satisfaction was not obtained, there was to be a personal judgment against Robinson and Van Buren on account of their breach of trust. The decree was not final, but a reference was ordered to ascertain certain facts, and the case was to be again set down upon the report and upon the equity reserved. This was done at a special term of the supreme court in equity, upon which occasion additional proof was taken showing that the personal remedy against Masten was worthless on account of his insolvency. The report also established that the real estate reassigned had been incumbered by mortgages and judgments to a large amount, if Masten was capable of incumbering it. The special term, in its decree, departed from the course which the chancellor had indicated. It declared the complainants' debt to be a lien upon the lands embraced in the terms of the reconveyance, and that that instrument was void between the plaintiffs and the defendants, and it directed a sale of these lands in satisfaction of the lien in the manner in which sales are made upon the foreclosure of a mortgage, and it prescribed the order in which the sale should take place, and provided for a personal judgment against Robinson and Van Buren for any deficiency which might remain unsatisfied of the plaintiff's debt. The effect of this decree as to the land was to carry out and execute the trusts of the assignment, and the purchaser under it took a

title of the same nature which he would have gotten if the trustees had themselves sold him the property in the course of administering the trusts. He holds his title under the assignment. Inasmuch, however, as the trust company was not at all concluded by the decree, and might still, if it were able, controvert the facts upon which the invalidity of the conveyance was pronounced, the purchaser brought this action to have that question determined, and to remove the cloud upon his title. Had the defendant been able to show that the purposes of the assignment had been accomplished, so that the title had reverted in Masten before the execution of the mortgage, the decree of the supreme court would not have stood in his way; but as the fact was found to be otherwise, the law considers him a stranger to the subject of the controversy, and he has no right to object to the disposition which the decree made respecting the land. All the parties interested in it were before the court, and of course concluded by what was done.

According to the practice of the court of chancery, it may be doubted whether it was regular to change the effect of decretal order of the chancellor upon the hearing upon the equity referred. The regular course was to petition for a rehearing. But if an error in this respect was committed, it does not affect the validity of the judgment. The parties to the suit chose to waive the irregularity, if one was committed; and a party against whom it is given in evidence in another suit cannot impeach it collaterally. Unless it is void for want of jurisdiction or some other cause, it can only be questioned in a proceeding for a review.

But the defendant is entitled to redeem. The mortgage to the trust company was not void. By sections 61 and 62 of the article of the revised statutes respecting uses and trusts (1 R. S. 729), Masten had such an interest in the premises, irrespective of the reconveyance by the trustees, that he could grant or devise them. Indeed, it is declared that he has a legal estate in them against all persons except the trustees and those claiming under them. But the plaintiff, as the purchaser under the judgment of the supreme court, is clothed with the rights of Dorman's representatives, and the defendant must, therefore, in order to redeem, pay the amount of that debt, with interest: *Vroom v. Ditmas*, 4 Paige, 526. But the defendant should not be compelled to pay the costs of the suit commenced in the court of chancery. The mortgage to the

trust company was on record, and that corporation, or the persons representing it, might have been made parties. The judgment of the supreme court, which requires the mortgage to be satisfied, must be reversed, without costs in this court, and the record must be remitted to enable that court to proceed as in an action for a foreclosure, if the defendant shall not elect to redeem the premises. The judgment of this court to be settled by one of the judges.

JOHNSON, C. J., and ALLEN, GRAY, and GROVER, JJ., concurred.

COMSTOCK, J., filed a dissenting opinion.

S. B. STRONG, J., also dissented.

SELDEN, J., did not sit in this case.

Judgment modified.

EXTINGUISHMENT OF TRUST, AND POWER OF TRUSTEE TO RELINQUISH IT: See *Ross v. Barclay*, 55 Am. Dec. 616, and cases in note 620. The principal case is cited in *Brennan v. Wilson*, 4 Abb. N. C. 288; S. C. on appeal, 71 N. Y. 507, to the point that after a trustee has accepted his trust he can only be relieved thereof, and divested of the trust estate by the order of a court of competent jurisdiction. Reconveyances to the grantor by assignees for the benefit of creditors are void as in contravention of the trust, if the trust has not been executed: *Ludington's Petition*, 5 Abb. N. C. 329; *Hardman v. Bowen*, 5 Abb. Pr., N. S., 337; *Juliand v. Rathbone*, 39 Barb. 102; *Griswold v. Perry*, 7 Lans. 104; *Russell v. Russell*, 36 N. Y. 585, all citing the principal case. In *Van Amringe v. Barnett*, 8 Bosw. 374, the principal case is cited, and it is questioned whether a grantor of such a trust estate would not have a legal estate against all persons except the trustee and those claiming under him. In *Schroeder v. Gurney*, 73 N. Y. 434, it is said that his interest would consist of a possible contingent remainder.

THE PRINCIPAL CASE WAS REARGUED, and the decision on such hearing is reported in 21 N. Y. 574, where the court held that the ruling in the principal case, wherein it was held that the mortgagee had such an interest as would entitle him to redeem, was erroneous, and that properly the party creating the trust, and those holding derivative titles under him, have no rights, legal or equitable, until the purposes of the trust are satisfied. In *Martin v. Smith*, 56 Barb. 608, citing the principal case, as reported above, and also referring to the report in 21 N. Y., Talcott, J., says that from the decisions, when taken together, he understands that the grantor of an estate in trust cannot make a valid mortgage of the right remaining in him, if there be any, while the trust continues, even though the trustee reconveys. To the same effect, see *Schroeder v. Gurney*, 10 Hun, 418; *Hardmann v. Bowen*, 39 N. Y. 200.

THE PRINCIPAL CASE IS CITED to the point that equity will control strictly legal rights for the promotion of equal and exact justice between parties: *Root v. Wheeler*, 12 Abb. Pr. 300. In *Acer v. Westcott*, 1 Lans. 197, S. C. on appeal, 46 N. Y. 390, the principal case is cited to the point that every purchaser of realty is presumed to have looked to every part of the title essential to its validity.

STURTEVANT v. STURTEVANT.

[20 NEW YORK, 39.]

ABSOLUTE CONVEYANCE OF LAND CANNOT BE SHOWN BY GRANTOR BY PAROL to be a grant in trust for himself, no fraud or mistake being alleged.

ACTION for money had and received. The opinion states the facts.

L. W. Thayer, for the defendant.

Hastings and Bingham, for the respondent.

By Court, JOHNSON, C. J. The ground on which this case was disposed of at the trial was that the evidence established that the defendant was trustee of the land to which the controversy relates, and was liable to account for the proceeds arising from its sale. It is in proof that a conveyance, absolute on its face, was made by the plaintiff to the defendant, and that at the same time the defendant gave the plaintiff his six promissory notes for two hundred and twenty-three dollars and ninety-six cents each, payable in one, two, three, four, five, and six years. The plaintiff seeks by parol, in the face of these papers, and without any allegation of fraud or mistake, to establish that this conveyance was in trust for his benefit. No parol trust of lands can be allowed without overthrowing the wholesome provisions of the statute of frauds. Even when the conveyance comes from a third party, a trust for the benefit of one who has paid the purchase-money is not allowed to exist if he has assented to the conveyance being made in that form. In the case of an absolute conveyance intended as a mortgage, we have held, following what we deemed the course of decision and the practice of the profession, that the mortgage might be made out by parol: *Hodges v. Tennessee M. & F. Ins. Co.*, 8 N. Y. 416. But that case affords no ground for saying that a parol trust can be upheld. There is in this case some evidence tending to show that the defendant was apparently willing to give up the land at one time, on being paid what the plaintiff then owed him; in other words, that he was then willing to recognize and carry out the trust. But there is nothing to show that the deed was intended at its execution as a mortgage. The judgment cannot be supported without completely upsetting the law in respect to the evidence to establish trusts of land,

and introducing all the uncertainty and liability to fraud which the statute was intended to guard against.

The judgment should be reversed, and a new trial ordered.

All the judges concurred.

Judgment reversed, and a new trial ordered.

ADMISSIBILITY OF PAROL EVIDENCE TO SHOW DEED ABSOLUTE TO BE MORTGAGE OR TRUST: See *Corbit v. Smith*, 71 Am. Dec. 431, and note 438. The principal case is cited to the point that parol evidence is properly admissible to show that a deed was intended as a mortgage or security: *Van Dusen v. Worrell*, 4 Abb. App. Dec. 675; S. C., 5 Abb. Pr., N. S., 288; 36 How. Pr. 287; 3 Keyes, 312; *Horn v. Ketelas*, 42 How. Pr. 152; *Hurst v. Harper*, 14 Hun, 283; *Barrett v. Carter*, 3 Lans. 70; *Brown v. Clifford*, 7 Id. 51; *McMahon v. Macy*, 51 N. Y. 161; but such evidence is not admissible to establish a trust in lands: *Wheeler v. Reynolds*, 66 Id. 234. In *Horn v. Ketelas*, 46 Id. 610, the court refers to the distinction made in the principal case, between a mortgage and a trust, in that while a deed absolute could be shown by parol to be a mortgage, a trust in favor of the grantor could not be established by parol.

BLACKSTOCK v. NEW YORK AND ERIE RAILROAD COMPANY.

[20 NEW YORK, 48.]

RAILROAD COMPANY IS LIABLE FOR DAMAGES CAUSED BY DELAY in transporting freight, though such delay was the result of a strike among its servants which rendered the running of trains impossible, of which strike the company had two days' previous notice.

ACTION against a railroad company for damages for delay in the carriage of a lot of potatoes. The cause of the delay was a strike, on two days' notice, among the company's engineers, lasting for fourteen days, during which the company diligently sought to procure other engineers to run its trains, but was not successful.

D. B. Eaton, for the appellant.

Culver, Parker, and Arthur, for the respondent.

By Court, DENIO, J. The position that the defendants are not responsible, because the misconduct of their servants was willful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged non-performance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of per-

sons for whose conduct they are responsible, they must answer for the consequences, without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform because his workmen had abandoned his service, proof that their conduct was willful and every way unjustifiable would not give the party injured an action against them; nor would it excuse the party who had made the contract. A similar point was taken in *Weed v. Panama R. R. Co.*, 17 N. Y. 362 [72 Am. Dec. 474], where the misconduct of the defendants' servants in detaining a train of cars was active, but it was held not to furnish any answer to the action for the detention. The cases in which it has been held that if a servant, while generally engaged in his master's business, willfully commit a trespass, as by intentionally driving his master's carriage against the carriage of another person, the master is not liable, have no application to the present case.

It has been repeatedly held, and may be taken as settled law, that a carrier is not under the same absolute obligation to carry the goods intrusted to him in the usual time which he is to deliver them ultimately at their destination: *Conger v. Hudson River R. R. Co.*, 6 Duer, 375; *Wibert v. New York etc. R. R. Co.*, 12 N. Y. 245. But in the absence of a legal excuse, he is answerable for any delay to forward them in the time which is ordinarily required for transportation, by the kind of conveyance which he uses. In the case of *Wibert v. New York etc. R. R. Co.*, *supra*, we held that where a railroad was fully equipped with engines and freight carriages, but more property was offered at a particular point than could be sent forward at once, the delay was justifiable, provided no unfair preference was given to other freight over that of the plaintiff. In the present case, the excuse arises wholly out of the misconduct of the defendants' servants who wrongfully refused to perform their duty, and thus deprived the defendants, for the time, of the ability to send forward the property; and the question is, whether the defendants' case can be separated from that of the engineers, so that it can be held that though the latter were culpable, their employers, the defendants, were without fault, and consequently not responsible to the plaintiff. This involves a consideration of the legal effect of the relations which exist between these several parties. In the first place, there was no privity between the plaintiff and the engineers. The latter owed no duty to the former which the law can recognize.

If they had committed a positive tort or trespass upon the property, the owner might pass by the employers and hold them responsible, but for a nonfeasance or simple neglect of duty, they were only answerable to their employees. The maxim in such cases is *respondeat superior*: Story on Agency, sec. 309; *Denny v. Manhattan Co.*, 2 Denio, 115; S. C. in error, 5 Id. 639. Although the nature of the contract between the railroad company and the engineers is not disclosed in the finding, it is quite improbable that it was such that the latter might throw up their employment upon two days' notice without any legal cause. If it were of that character, the liability, moral as well as legal, would rest upon the defendants, for in that case they would have neglected a most ordinary precaution for securing the continuous running of their trains. Assuming, then, that abandoning their work was a breach of contract on the part of the engineers, they by that act became responsible to the defendants for all its direct consequences. The case, therefore, is one in which the actual delinquents, through whose fault the injury was sustained, were responsible to the defendants, but were not responsible to the plaintiff. This shows the equity of the rule which holds the master or employer answerable in such cases. Its policy is not less apparent. Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. In the case of a loss by the misconduct of a servant, the party injured has no means of ascertaining whether due caution was exercised by the master in employing him, or prudence in retaining him; and in the case of a controversy between the master and the servant as to which was the real delinquent, the owner of the property must generally be without the necessary evidence to charge the liability upon the master. The rule which the law has adopted, by which the master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons intrusted with the property of others. The motive of self-interest is the only one adequate to secure the highest degree of caution and vigilance by the master. The principle itself is extremely well settled: Story on Agency, sec. 452; 2 Kent's Com. 259; *Harlow v. Humiston*, 6 Cow. 189; *Ellis v. Turner*, 8 T. R. 531.

I cannot see anything in the circumstances of the defendants to take the case out of the rule. Being a corporation, all

their business must necessarily be conducted by agents, and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all. A railroad corporation is no doubt peculiarly exposed to loss from the misconduct of its engineers; and in the present case it does not appear that the slightest blame can attach to any of the superior officers of the company. Still the property intrusted to the defendants to carry has been lost from a failure on their part to perform the duty with which they were charged, and the only answer which they are able to make to the demand for compensation is that the failure was caused by the misconduct of their servants. This we have seen cannot avail them as a defense. I have looked into the exceptions to the rulings of the judge upon the trial, and think those rulings were in both the instances where exceptions were taken, entirely correct.

The judgment of the supreme court must be affirmed.

SELDEN, J., was absent.

All the other judges concurred.

Judgment affirmed.

DUTY OF RAILROAD COMPANY TO DELIVER FREIGHT PROMPTLY, and liability for loss by delay: *Ohio & Miss. R. R. Co. v. Dunbar*, 71 Am. Dec. 291, and note 298. The principal case is cited in *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 444, and *Tierney v. New York Central & H. R. R. Co.*, 76 Id. 308, to the point that common carriers assume to use reasonable diligence in carrying property, and are liable for unreasonable delay.

CORPORATIONS ARE LIABLE FOR ACTS OF OFFICERS within the scope of their employment or position: *West Side S. Bank v. Newton*, 8 Daly, 341; S. C., 57 How. Pr. 163; *Fort v. Whipple*, 11 Hun, 593; *Williamson v. Mason*, 12 Id. 104; *Jaffray v. Brown*, 17 Id. 575, all citing the principal case.

JOHNSON v. HUDSON RIVER RAILROAD COMPANY.

[20 NEW YORK, 65.]

BURDEN OF PROOF, IN ACTION FOR DAMAGES FOR PERSONAL INJURIES resulting from defendant's negligence, is not always upon the plaintiff to affirmatively establish the absence of his own contributory negligence, or upon the defendant to prove the contrary in order to establish his defense; but such facts may be inferred from the circumstances; and the disposition of men to take care of themselves and keep out of difficulty may be properly taken into consideration.

IN ACTION FOR PERSONAL INJURY CAUSED BY DEFENDANT'S NEGLIGENCE to carry the case to the jury, the evidence on plaintiff's part must be such as, if believed, would authorize the jury to find that the injury was occasioned solely by negligence of the defendant.

WHERE RAILROAD COMPANY WAS RUNNING ITS HORSE-CAR WITHOUT LIGHTS OR BELLS, in the streets of a city on a dark night over a track obstructed by a sewer in process of construction, and it appeared that plaintiff's decedent, a sober cartman, was found dead on such track under circumstances showing that he was struck by defendant's car while groping in the dark for a safe passage for his team, in the absence of any other evidence, there being no witness to the accident, the dangerous tendency of defendant's conduct was such as to authorize the attributing of the accident to the negligence of the defendant and to justify the refusal of a nonsuit, the presumption being that plaintiff had the same regard for his own safety as other men ordinarily have.

ACTION for damages for negligently killing plaintiff's husband. The opinion sufficiently states the facts

William Fullerton, for the appellant.

Henry Morrison, for the respondent.

By Court, DENIO, J. It is insisted on behalf of the defendants that the judge erred in refusing to hold as matter of law, upon the facts proved, that the deceased was guilty of negligence; that if any question upon that branch of the case could be left to the jury, still he erred in charging that the negligence which would preclude a recovery must be such as directly contributed to the injury; and finally, that he erred in his statement of the measure of care and prudence required from the deceased and the defendants respectively.

First. The general rule has been so often laid down and reiterated, that to enable a party to recover in this class of actions, the person injured must not by his own negligence have contributed to the injury, that it must be considered a legal postulate. I agree that this is an element in the definition of the cause of action, and that the plaintiff's case, when presented to the jury, must not be defective upon that point, any more than upon that of the defendants' negligence. This is embraced in the proposition that the injury must be the result of the negligence of the defendants; for if the culpable conduct of both parties united in bringing it about, that proposition is not true. But I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious

and attentive, and he might recover though there were no witnesses of his actual conduct.

The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. But if one make an excavation or lay an obstruction in the highway, which may or may not be the occasion of an accident to a traveler, it would be reasonable to require a party seeking damages for an injury to give general evidence that he was traveling with ordinary moderation and care. The obligation to give such evidence would be greater or less according as the impediment was more or less dangerous. Thus in *Butterfield v. Forrester*, 11 East, 60, the defendant, in making some repairs to his house in a town, had put up a pole across the road, leaving, however, a free passage by a branch or street in the same direction. The plaintiff rode against it and was injured. No question arose as to the *onus*; but it being proved that he was riding immoderately, it was held that he could not recover. So in *Smith v. Smith*, 2 Pick. 621 [13 Am. Dec. 464], the defendant had piled cord-wood by the side of the highway at the foot of a hill, and one stick projected eight inches into the road. The plaintiff in a dark night drove an overloaded wagon down the hill without any shaft-girth to the harness. The wagon struck the horse, and he ran alongside of the wood pile and against the projecting stick, and caused an injury. A verdict for the defendant was sustained by the court, on the ground that the plaintiff's conduct had contributed to the accident. There was no controversy here as to the *onus*, all the facts being before the jury. If there had been no evidence of the circumstances, but only that the plaintiff had driven in the daytime against the stick of wood, and had been injured, although leaving the stick in that position was an act of negligence, still it might be reasonable to require the plaintiff to show that his carriage was properly equipped, and that he drove with ordinary circumspection, and in such a case I conceive that it might be quite right to nonsuit the plaintiff for not having made out a case proper to be submitted to the jury. But suppose the case of a dangerous excavation in a highway which a very prudent man might possibly avoid, but which he would be in great danger from, and a man was found to have fallen into it, the case being so situated that the precise circumstances could not be

happened. The ruling was affirmed on a motion for a new trial. This, I think, was correct, if we assume that the defects shown to exist in the road were such as the driver of the coach, in the exercise of ordinary caution, could avoid. The court does not affirm that if there was no direct evidence as to the conduct of the driver, the plaintiff would necessarily fail; on the contrary, the chief justice remarks that proof that the person driving was commonly careful and skillful, that there was no apparent cause for the accident but the bad condition of the highway, and the condition in which the carriage was at the time, were all circumstances upon which the jury might pass their judgment, and infer that due skill and care were used.

The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendants' delinquency may be such as to prove, *prima facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show by independent evidence that he did not bring the misfortune upon himself. No more certain rule can be laid down.

The present case is not wholly free from difficulty, but I think it presented a fair question for the jury. Its determination depended upon the view which should be taken of the tendency of driving a railroad train at considerable speed through a city street, not lighted, on a dark evening, and without any proper means of giving notice to persons who might be upon the track, and without any lamps on the cars to enable the driver to see what might be on the rails before him. That such running was hazardous in a high degree, I cannot doubt. Then we are to consider that the railroad was at the same time a thoroughfare for persons on foot and with carriages, and that such persons might innocently be upon it at all times, save when the cars were actually passing, and also that at the point of intersection with Gansevoort street, West street was, upon one view of the evidence, substantially a cul-

de-sac as to all purposes except the passage of the cars. The deceased was proved to have been perfectly sober on the night in question. The evidence left it to be inferred that he had been stopped by the excavation and the earth thrown up on its margin; and the inference was a probable one that, having fastened his horse, he was groping his way to the other side to see whether there was an outlet there when the cars came upon him. If the forward car had been suitably lighted in front, it would have warned him, and at the same time have notified the driver; or if the horses had been provided with bells, it may well be that he would have heard them, and have moved off the track. In the absence of proof to the contrary, we are to assume that he had the same regard for his own safety as other men, and the remark of the judge in his address to the jury, that he could not have heard the cars, was a reasonable suggestion. I think it fell within the class of cases which I have mentioned, of an act so eminently suggestive of dangerous consequences, that when we find that an accident has actually occurred, it is reasonable, *prima facie*, to refer it to the conduct of the defendants' servants without requiring further proof.

Second. Upon the question whether there was error in the instruction, that in order to exonerate the defendants on the ground of negligence on the part of the deceased, it must be such as directly contributed to the accident, I concur in the reasoning of Judge Strong in the case of Button against these defendants, before referred to. I do not see that the term used was particularly significant; but as there was no conceivable negligence which could be imputed to the deceased which would operate remotely, or collaterally, or otherwise than directly, I am of opinion that the jury were not misled. The attention of the judge was not specially called to the expression, as in the case of Button. In *Tuff v. Warman*, 2 C. B., N. S., 740, which was the case of a collision between two vessels, and the alleged negligence of the plaintiff was in not keeping a lookout and porting his helm when he found himself in danger of meeting the defendant's vessel, the judge charged the jury that if they were of opinion that the plaintiff, by his own negligence, directly contributed to the accident, they must find for the defendant; but that if they thought that the defendant directly caused the injury, they must find for the plaintiff. Much of the discussion on the motion for a new trial turned upon the use of the word "directly;" the defendant's counsel contending that the instruction should have been

that the plaintiff could not recover if he in any way contributed to the accident. The court however held, in substance, that the only way in which the imputed negligence could operate was direct, and that the instruction could not mislead, and a new trial was refused.

Lastly. In that part of the charge which relates to the degree of care required from the respective parties, the judge was not led to speak of the distinction between the duty which a carrier of persons owes to his passengers, and that which persons outside the carriage are entitled to claim from the carrier, but he was calling the attention of the jury to the peculiarities of the case before them. He did not, in my opinion, overstate the obligations which attach to persons running cars in the night over a course which is also a public street, in saying that they were bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest. The degree of care required from persons driving vehicles upon a thoroughfare varies according to the circumstances of the case, and is proportioned to the danger to be apprehended of inflicting injury upon others. The rule which would apply to ordinary carriages on common roads would be quite inadequate as a test of that required from the managers of railroads: *Kelsey v. Barney*, 12 N. Y. 425; *Hegeman v. Western R. R. Corporation*, 13 Id. 9 [64 Am. Dec. 517].

As to the party injured, the rule is that he must have conducted with ordinary care and prudence, but he also must have regard to the particular circumstances of the case, and one who has a right to go across or upon a railroad track must exercise quite another sort of vigilance than a man who travels on a common road. This is what the judge meant when he instructed the jury that the question was whether the deceased used that care and foresight which men of ordinary prudence would probably employ when placed in like circumstances. The defendants had no cause to complain of that instruction.

These views, if concurred in, will lead to an affirmance of the judgment of the superior court.

SELDEN, J., was absent.

S. B. STRONG, J., doubted whether there could be a presumption in this case that the defendant used any care whatever, and was disposed to reverse.

All the other judges concurred.

Judgment affirmed.

RAILROAD COMPANIES MUST EXERCISE ALL NECESSARY CARE to avoid injury to others, and in the absence thereof are liable for such injury as is caused by their neglect: *St. Louis and South-eastern R'y Co. v. Valerius*, 56 Ind. 520. The degree of care which an engineer is required to use depends upon the circumstances, time, and place, but he is bound to take due care to avoid injuring persons crossing the track: *Cheney v. New York C. & H. Riv. R. R. Co.*, 16 Hun, 421. A company running cars in a public street in a city is bound to use the highest degree of care towards persons using the streets: *Kinney v. Ocker*, 18 Wis. 81; and particularly so at night: *Fero v. Buffalo & H. L. R'y Co.*, 22 N. Y. 213; and the omission in such cases to use bells or lights is evidence of negligence: *Weber v. New York C. & H. Riv. R. R. Co.*, 58 Id. 461. The presumption in an action for personal injuries is, that a railroad company properly discharges all its duties, and others have a right to rely on and govern their action thereby, unless informed or notified to the contrary: *Gonzales v. New York & H. R. R. Co.*, 39 How. Pr. 420. All the above cases cite the principal case.

CONTRIBUTORY NEGLIGENCE AS BAR TO RECOVERY in an action for personal injuries: See the extensive note to *Freer v. Cameron*, 55 Am. Dec. 667-677, discussing this subject fully; *Peoria Bridge Ass'n v. Loomis*, 71 Id. 263; *Reeves v. Delaware, L. & W. R. R. Co.*, 72 Id. 713, and notes. Unless a party is entirely free from contributory negligence, it is said, citing the principal case, that he cannot recover, and that the greatest degree of negligence on defendant's part will not cure the defect of the least negligence contributing to the injury on plaintiff's part: *Delafield v. Union F. I. Co.*, 5 Robt. 216. A plaintiff to recover is bound to have exercised ordinary prudence and no more, and it is for the jury to determine whether it appears from the evidence that there has been on plaintiff's part a want of that care and foresight that men of ordinary prudence are accustomed to employ if placed in like circumstances: *Besiegal v. New York Cent. R. R. Co.*, 31 Hun, 187; S. C., 34 N. Y. 627; 40 Id. 33; *Baxter v. Second Ave. R. R. Co.*, 3 Robt. 514. One who on a public highway approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous: *Ernst v. Hudson R. R. R. Co.*, 3 Abb. Pr., N. S., 95; S. C., 32 How. Pr. 80; 35 N. Y. 27; *Phelps v. Wait*, 30 Id. 79; *Thomas v. Delaware, L. & W. R. R. Co.*, 8 Fed. Rep. 731; and where it appears that if a person had used his senses of hearing or sight, he must have seen or heard an approaching train, and could have avoided it, but failed to do so, his negligence will prevent a recovery: *Mitchell v. New York Cent. & H. R. R. Co.*, 64 N. Y. 655. A person bereft of his senses of sight or hearing, however, is not governed by the same rule as to negligence: *Davenport v. Ruckman*, 10 Bosw. 32. All the above cases cite the principal case to the points mentioned.

BURDEN OF PROOF IN CASES OF NEGLIGENCE.—In an action for personal injuries from the negligence of defendant, though the plaintiff must be free from fault, he need not show such fact affirmatively in the first instance, but the absence of fault on his part may be inferred from the circumstance in connection with the ordinary habits, conduct, and motives of men: *Jetter v. New York & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 460; S. C., 2 Keyes, 159; *Brehm v. Great Western R. R. Co.*, 24 Barb. 270; *Welling v. Judge*, 40 Id. 209; *Robinson v. New York Cent. and Hudson River R. R. Co.*, 65 Id. 149; *Williams v. O'Keefe*, 9 Bosw. 539; S. C., 24 How. Pr. 19; *Baxter v. Second Avenue R. R. Co.*, 30 Id. 223; *Warner v. New York Central R. R. Co.*, 44 Id. 471; *Baird v. Gillett*, 47 Id. 186; *Moody v. Osgood*, 54 Id. 496; *Reynolds v. New York Central & H. R.*

R. R. Co., 58 Id. 251; *Squire v. Central Park, N. & E. R. R. Co.*, 36 N. Y. Super. Ct. 448; *Halpin v. Third Avenue R. R. Co.*, 40 Id. 183; *Hill v. Gust*, 55 Ind. 50; *Railroad Co. v. Gladmon*, 15 Wall. 407; *Murphy v. Deane*, 101 Mass. 464, all citing the principal case. Although absence from fault may thus frequently be inferred from facts and circumstances, still, where that cannot be done, it must be proved by direct evidence. In other words, it must appear in some way that the injury was caused solely by the fault or neglect of the defendant: *Van Lien v. Scoville Mfg. Co.*, 14 Abb. Pr., N. S., 75, 76; *Chadbourne v. Delaware, L. & W. R. R. Co.*, 6 Daly, 219, both citing the principal case. In cases where no degree of care on defendants' part could have prevented the injury under the circumstances, its negligence must be affirmatively proved: *Deyo v. New York Cent. R. R. Co.*, 34 N. Y. 13. To carry a case to the jury, the evidence on plaintiffs' part must be such as if believed would authorize them to find that the injury was occasioned solely by the fault of defendant: *Cosgrove v. New York C. & H. R. R. Co.*, 13 Hun, 330; *Wilds v. Hudson River R. R. Co.*, 23 How. Pr. 495; S. C., 24 N. Y. 433; *Meyer v. Betz*, 3 Robt. 172; *Clare v. National City Bank of New York*, 1 Sweeny, 543; *Gay v. Winter*, 34 Cal. 164; *Taber v. Delaware, L. & W. R. R. Co.*, 4 Hun, 767; *Bateman v. Ruth*, 3 Daly, 385; *Gaynor v. Old Colony R. R. Co.*, 100 Mass. 214, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Urquhart v. Ogdensburgh*, 23 Hun, 76, 77, to the point that it is unnecessary in an action for damages for injury by negligence to aver in the complaint that the injury occurred without plaintiff's fault. In *Swinerton v. Columbia Ins. Co.*, 37 N. Y. 190, it is cited as an instance of subjects and matters of which courts take judicial notice.

GRANT v. TALLMAN. GREENE v. TALLMAN.

[20 NEW YORK, 191.]

PURCHASER OF LAND UNDER DEED CONTAINING COVENANTS AGAINST INCUMBRANCES, if he subsequently pays off and discharges any incumbrance, may set off what has been paid by him against the amount due on a mortgage for the purchase-price, if what was paid was actually due, or he had given notice to his vendor requiring him to pay off the incumbrance.

MEASURE OF DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES is the amount necessary to buy up the outstanding incumbrance, except in cases of fraud, where the purchaser may recover for the loss of a bargain.

ACTION to foreclose a mortgage. Greene conveyed to Tallman a lot of land in New York city by deed containing covenants against incumbrances, and took from Tallman and his wife, the defendants, in place of part of the purchase-price, the mortgage which it was the object of this action to foreclose. Defendants, in answer to the action, set up a breach of the covenant against incumbrances on plaintiff's part, but instead of asking that the damages resulting to them be allowed as a set-off, or by way of recoupment, set up such facts as might have been done if such damage exceeded the amount of the

mortgage, and therefore barred the plaintiff from any right of purchase, the incumbrance here being in fact less than the amount of the mortgage. The incumbrance mentioned consisted of the right in another to a yearly ground or quit rent, which, however, had never been paid or demanded of either Greene or Tallman. Defendant, on the trial, proved that, by reason of the quit-rents, he had lost the sale of the land to one party for a large price, and that he had sold it subsequently to one Bradford for a much less sum than Bradford testified he would have paid but for the quit-rents. Judgment was rendered for plaintiff for the amount of the mortgage. Defendants appealed.

John K. Porter, for the appellants.

William Inglis, for the respondent.

By Court, S. B. STRONG, J. There can be no doubt that if the charge of fraud preferred against Greene in the answer had been proved, Tallman, if he had not sold the property, would have been entitled to recoup in this suit to the extent of his actual damage; and if that had exceeded or equaled the amount of the mortgage, it would have constituted an entire defense. But there was no attempt to show any fraud, nor was there anything in the evidence from which it could be inferred on the trial.

In the absence of fraud, a party who has purchased real estate, and received a deed for it containing a covenant that it is free from any incumbrance, and has subsequently paid off and discharged an incumbrance, may set off what has been paid by him against the amount due on any mortgage for the purchase-money. In order to avail himself of such defense, however, he would be bound to prove either that what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off the incumbrance within a limited time, or that otherwise the purchaser would pay a specified amount. Some of the authorities lay down the rule that the purchaser may set off or recover the amount paid without any qualification; but it seems to me reasonable that a vendor who has been innocent of any fraud should have an opportunity to set himself right before he should be obliged to pay or allow more than the amount actually due. It is, I think, well settled that where the incumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he

cannot have relief against his contract to pay the purchase-money, or any part of it, on the ground of defect of title. The reason is, that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase-money should be retained. The circumstances of this case furnish a strong illustration of the reasonableness of the principle. It is quite apparent that there is no probability that the owner of the mortgaged premises will ever be called upon to pay any part of the quit-rents. There is a mere possibility that a claim may be made by the city corporation; but in such case the existing owner may, by a complaint in equity, coerce the entire payment out of the other portions of the lands conveyed to Hammond; and if he could not do that, a recovery against him would enable him to sue for or recoup the fair value of the entire incumbrance.

The defendants Tallman and wife seek to recoup the damages sustained by them by reason of the liability of the land for contribution towards payment of the quit-rents, and estimate such damages at the difference between what he obtained and what, but for the incumbrance, he might have obtained for the lot. But such is not the rule, except in cases of fraud. Parties in other cases can only be entitled to the amount actually payable on such incumbrance, or, where the amount cannot be ascertained by calculation, to its value. In the case of *Dimmick v. Lockwood*, 10 Wend. 155, Chief Justice Savage remarked that "in all the cases which have been cited, there is none in our own courts where the purchaser has been permitted to recover beyond the consideration and interest and costs. There is none in Massachusetts where, under the covenant against incumbrances, the purchaser has recovered any more, though there the rule allows a recovery for the value at the time of the eviction. All the reasoning of our own judges goes to limit the responsibility of the grantor to the consideration with interest and costs; and I am unwilling to go further where the principle to be established may lead to greater injustice." That was an action for the breach of a covenant in a deed of land that it was free from incumbrances, and the decision was, that the recovery should be limited to a portion of the consideration equivalent to the extent of the incumbrance, and not include the enhanced value of the land in consequence of subsequent improvements. The same is true in cases where there has been a general advance in the price of real estate.

I am satisfied that the established rule in such cases is that the recovery, when any can be had, must be restricted to the actual amount or value of the incumbrance, and where the purchaser has not occupied or enjoyed the premises, the interest. No consequential damages are allowed. The reason given is, that when the incumbrance is actually unknown to the vendor, as is generally the case where he covenants against them, the means of discovering them are, or with proper exertions may be, equally accessible to both parties.

If the intended purchaser should make proper examination, he would ordinarily discover an incumbrance, which must be in writing, and the evidence on record; and should he neglect to do that, he cannot reasonably claim any more than an exemption from positive loss. Now, what is the value of a lien specifically upon the lot in question? Under the circumstances, it is nothing. What is the actual loss to the defendant Tallman? That, too, is nothing. He was to pay or allow in all six thousand dollars for the lot. He occupied it without the payment of any part of the quit-rent until his sale to Bradford, when he obtained for it eight thousand dollars. He entered into no covenants in his deed, and as the purchaser was not deceived as to the incumbrance, Tallman is under no obligation to return any part of the purchase-money, should the lien for any part of the rent be enforced against the premises. The demand was not enforced against him while he owned the lot, nor has it been since, nor can it be now. He might, it is true, be subjected to a judgment if there should not be enough in the proceeds of the land to satisfy the debt and costs. But considering what he alleges to be the value of the premises, there is not enough of probability of there being a deficiency to form the basis of any action. Possibly the judgment might have been so qualified as to relieve him from any such liability, if he had asked for it; but he did not. I think that, under the circumstances, the defendant's claim to recoup or set off damages was properly rejected.

The assignment from Greene vested in the plaintiff the legal title to the securities. He was the legal owner when this suit was instituted, and the suit was rightly commenced in his name. It could be legally continued in his name, notwithstanding his having received the debt for which the securities had been assigned to him: Code, sec. 121.

The judgment should be affirmed.

cannot have relief against his contract to pay the purchase-money, or any part of it, on the ground of defect of title. The reason is, that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase-money should be retained. The circumstances of this case furnish a strong illustration of the reasonableness of the principle. It is quite apparent that there is no probability that the owner of the mortgaged premises will ever be called upon to pay any part of the quit-rents. There is a mere possibility that a claim may be made by the city corporation; but in such case the existing owner may, by a complaint in equity, coerce the entire payment out of the other portions of the lands conveyed to Hammond; and if he could not do that, a recovery against him would enable him to sue for or recoup the fair value of the entire incumbrance.

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The assignment from Greene vested in the plaintiff the legal title to the securities. He was the legal owner when this suit was instituted, and the suit was rightly commenced in his name. It could be legally continued in his name, notwithstanding his having received the debt for which the securities had been assigned to him: Code, sec. 121.

The judgment should be affirmed.

All the judges, except SELDEN, J., who was not present, concurred.

Judgment affirmed.

MEASURE OF DAMAGES FOR BREACH OF COVENANTS AGAINST INCUMBRANCES: See *Willson v. Willson*, 57 Am. Dec. 320, and cases in note; *Reed v. Pierce*, 58 Id. 761, and note. Until actual payment of the amount of the incumbrance, the covenantee can have only nominal damages: *Reading v. Gray*, 37 N. Y. Super. Ct. 92; but on actually paying the amount of the incumbrance, the covenantee may recover not to exceed the consideration paid: *Messer v. Oestreich*, 52 Wis. 695. If, however, on the breach of the covenant, the covenantor himself becomes an actor in ousting his grantee in breach of his covenant, he puts himself without the protection of this rule of damages, and becomes liable for the value of the estate he was instrumental in taking from his grantee: *Mack v. Patchin*, 29 How. Pr. 32; S. C., 42 N. Y. 173. The above cases cite the principal case to the points mentioned.

THE PRINCIPAL CASE IS CITED IN *Pect v. Yorks*, 75 N. Y. 424, to the point that the assignee of a chose in action may enforce payment by an action in his own name.

WOLFE v. HOWES.

[20 NEW YORK, 197.]

PERSON CONTRACTING TO RENDER HIS PERSONAL SERVICES to be paid for in part during the employment, and the remainder at the end of the term, if he performs services valuable to the employer, but is before the expiration of the stipulated period disabled by sickness from completing his contract, is entitled to recover upon a *quantum meruit* for such services as were rendered by him.

IN ACTION ON QUANTUM MERUIT, plaintiff need not set up in his complaint the excuse for not fully performing his contract, this being a matter of reply to a defense interposing the contract.

ACTION for work and labor done. It appeared in defense that the work was done under a special contract for the personal services of one Vache, for a specified time, which contract had not been fulfilled. Plaintiff, Vache's administrator, set up in reply to the defense interposing the contract, that Vache, by reason of sickness and without fault on his part, became incapable of further performing his contract. Judgment was rendered for plaintiff. Defendants appealed.

Timothy Jenkins, for the appellants.

Francis Kernan, for the respondent.

By Court, ALLEN, J. There can be little doubt, I think, that the contract with Vache contemplated his personal services. This is evident, both from the nature of the business and the

amount of compensation agreed to be paid him. It is also manifest from the evidence on both sides. The business of pot-making required skill and experience. It was an art to be acquired after much study and labor, and which Vache seemed to have accomplished. The execution of the work required his constant and personal supervision and labor. No common laborer could have supplied his place, and hence the amount of his wages was largely increased beyond that of such a hand. The extra help mentioned in the contract had reference to the breaking away of the flattening, so called, and to its repair, and nothing else. The whole testimony shows this, as well as that the personal services of Vache were contracted for. The referee, therefore, well found and the court below well decided that such were the terms of the contract.

2. The question is then presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labor under the contract, and continues in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator.

The broad ground is taken on the part of the defendants' counsel, that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long settled as a general principle, both in England and in this as well [as] in most the other states, that where the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover: *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299]; *Reab v. Moor*, 19 Id. 337; *Jennings v. Camp*, 13 Id. 94; Id. 390 [7 Am. Dec. 367]; *Sickels v. Pattison*, 14 Wend. 257 [28 Am. Dec. 527]; *Langtry v. Parks*, 8 Cow. 63, and various other cases. It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do, indeed, rather intimate such a doctrine: *Cutter v. Powell*, 6 T. R. 320; *Hadley v. Clarke*, 8

Id. 267; *Appleby v. Dods*, 8 East, 300; *Hulle v. Heightman*, 2 I. 145, and some others. These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of *Cutter v. Powell*, *supra*, is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based is the question, as stated in *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299], What was the real intention of the parties? The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death, or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract, *Deo volente*? It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood as written in the contract. Nor is this principle wanting sanction either by elementary writers or adjudged cases. "Where the performance of a condition is prevented by the act of God, . . . it is excused:" Cru. Dig., tit. Condition, 41, 43; 3 Kent's Com. 471; 2 Id. 509; *Medeiros v. Hill*, 8 Bing. 231. In *Mounsey v. Drake*, 10 Johns. 27, 29, the court say: "Performance must be shown, unless prevented by the act of God or of the law:" 1 Shep. Touch. 180; Gilbert on Covenants, 472; *People v. Manning*, 8 Cow. 297 [18 Am. Dec. 451]; *People v. Bartlett*, 3 Hill (N. Y.), 570; *Carpenter v. Stevens*, 12 Wend. 590; Chit. Con. 631; 1 Parsons on Cont. 524, and note; *Fenton v. Clark*, 11 Vt. 562; *Fuller v. Brown*, 11 Met. 440.

There is good reason for the distinction which seems to obtain in all the cases, between the case of a willful or negligent violation of a contract and that where one is prevented by the act of God. In the one case the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance. There is

another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments, sec. 36, and notes, where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a *quantum meruit*. But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator Vache.

But without pressing this point further, it is sufficient to say that it was virtually decided against the defendants by this court, in the case of *Jones v. Judd*, 4 N. Y. 411. It was there decided that when, by the terms of the contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is entitled to recover for the amount of his labor. In that case the work was stopped by the state officers in obedience to an act of the legislature suspending the work; and the court held that as the contractor was without fault, he was entitled to recover. The case of *Mounsey v. Drake*, 10 Johns. 27, was referred to and approved of as authority in favor of the position; and see *Beebe v. Johnson*, 19 Wend. 502 [32 Am. Dec. 518].

The conclusion, then, is that where the performance of work and labor is a condition precedent to entitle the party to recover, a fulfillment must be shown; yet that where performance is prevented or rendered impossible by the sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice.

These views dispose of the main questions in the case. It is necessary to notice one or two of minor importance.

It is insisted that if sickness were an excuse for the non-performance of the contract on the part of Vache, such

excuse should have been alleged in the complaint, and this not having been done, that the plaintiff is not entitled to recover. It is true that the plaintiff might have set up the agreement and the excuse for its non-performance, and entitled himself to recover upon such a pleading. But the complaint proceeds upon a *quantum meruit*; and upon showing the work and labor of Vache, the plaintiff entitled himself to recover. The defendants set up the special agreement as matter of defense, and the plaintiff's excuse was properly enough matter of reply. The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though his remedy was as upon a *quantum meruit*. So say some of the cases already cited.

Again, it is said that if the plaintiff was entitled to recover anything, it could be only ten dollars a month, and that the defendants' set-off having been found by the referee to amount to more than that, the defendants were entitled to judgment. This objection is not tenable. The compensation was to be at the rate of forty dollars per month; ten dollars (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time. This, however, having been rendered impossible, the plaintiff was entitled to recover, if anything, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract.

It is further urged that the referee erred in not allowing defendants' damages accruing to them after Vache was sick and before he quit. That was a question of fact entirely for the referee. He found that the plaintiff did his work well and skillfully down to the time of his sickness; he allowed and deducted the whole amount of set-off proved by defendants; and he does not find that the defendants sustained any damages by reason of any defect in Vache's work down to the time of his quitting in December, 1852. With these questions of fact we cannot interfere. The court below sanctioned the finding. I think they were fully warranted in so doing. At all events, we are not at liberty to interfere.

The judgment must be affirmed.

JOHNSON, C. J., concurred, observing that it was material that the defendants had received actual benefit from the ser-

vices of the plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless; as *e. g.*, if one should be retained to compose an original literary work, and having faithfully employed himself in preparation, should die without having completed any work of value to the employer.

COMSTOCK, J., and other judges concurred in this qualification.

Judgment affirmed.

RECOVERY ON QUANTUM MERUIT IN CASE OF PREVENTION OF COMPLETE PERFORMANCE OF CONTRACT: See *Winstead v. Reid*, 57 Am. Dec. 571; *Coe v. Smith*, 58 Id. 618; *Hillyard v. Crabtree*, 62 Id. 474; *Doster v. Brown*, 71 Id. 153, and the cases cited in the notes to these cases. The principal case is cited to the point that where a contract has not been fully performed, and further performance becomes impossible, but there has been a partial performance beneficial to one party, the other may recover on a *quantum meruit*: *Tait v. New York L. I. Co.*, 1 Flip. 337; *Leopold v. Salkey*, 89 Ill. 420; *Clark v. Gilbert*, 32 Barb. 582; 3 C., 26 N. Y. 282; *Seymour v. Cagger*, 13 Hun, 32; *Spalding v. Rosa*, 71 N. Y. 44; *Green v. Gilbert*, 21 Wis. 400; *Cook v. McCabe*, 53 Id. 255. Act of God is a sufficient excuse for non-performance of the balance of a contract, so as to authorize a recovery on a *quantum meruit*: *Tait v. New York L. I. Co.*, 1 Flip. 331; *New Haven & N. C. v. Quintard*, 6 Abb. Pr., N. S., 132; 3 C., 1 Sweeny, 97; *Worth v. Edmonds*, 52 Barb. 43; *Howell v. Knickerbocker L. I. Co.*, 24 How. Pr. 477; *People v. Tubbs*, 37 N. Y. 588; *Price v. Hartshorn*, 44 Id. 102; *Galein v. Prentice*, 45 Id. 165; *Cohen v. New York M. L. Ins. Co.*, 50 Id. 622; and sickness or death is regarded as an act of God preventing performance: *Jennings v. Lyons*, 39 Wis. 557.

OLCOTT v. TIOGA RAILROAD COMPANY.

[20 NEW YORK, 210.]

STATUTE OF LIMITATIONS IS NOT AVAILABLE AS DEFENSE TO ACTION against foreign corporation in New York.

ACTION against a corporation formed and existing under the laws of Pennsylvania. As a defense to the action, the bar of the statute of limitations was set up. The remaining facts appear in the opinion.

Nicholas Hill, for the appellant.

John H. Reynolds, for the respondent.

By Court, DENIO, J. It cannot be doubted but that it was the general object of the statute of limitations to save the remedy of the creditor in all cases where he was prevented

from prosecuting the debtor in our courts, in consequence of the absence of the latter from the state: 2 R. S. 295, 297, secs. 18, 27. That such is its effect in respect to natural persons is conceded. If the debtor, being an individual, resided out of the state when it accrued, no period, however great, will bar 'he claim while he continues so to reside. There is no apparent reason, in the nature of the case, for discriminating in this respect in favor of a foreign corporation; but it is argued that the provision saving the rights of the creditor is clothed in such language that it cannot without violence be applied to any except natural persons. This is not on account of the use of the word "person" in the twenty-seventh section, for that will embrace a corporation, provided there is nothing in the connection in which it is used repugnant to such a construction: 2 R. S. 778, sec. 11. But it is true that returning to a state or departing from it are acts which cannot be predicated of any but natural persons. It must therefore be conceded that the latter branch of the section, which provides that if, after a cause of action shall have accrued, "such person shall depart from and reside out of this state," the time of his absence shall not be reckoned as part of the time limited, can have no application to a corporation existing under the laws of this state; and there would be no use in such an application of it, for our corporations can always be sued in our courts. It is not so clear, however, that the former part of the section must necessarily be limited to the case of a debtor who has the ability to return to the state. The provision is, that if, at the time the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the term before limited after the return of such person into this state. But suppose the person, being an artificial, corporate body, legally confined to the territory of another state, cannot by possibility return here, then by a verbal construction of the sentence the action may be commenced at any time; for the period of limitation will never commence to run. Ordinarily it is not necessary, in order to bring a subject within the purview of a statute, that every particular of the statutory language should apply to it, provided the intent to embrace it is clear: *Spraker v. Cook*, 16 N. Y. 567.

The courts have uniformly applied to statutes of limitation a liberal construction, and in many instances have accommodated the strict language of the act so as to effectuate the general intention of the legislature. Thus the statute (4 Anne,

c. 16, sec. 19) provides, in nearly the same language as our act, that if the person against whom a cause of action shall accrue shall at the time be beyond the seas, the action may be brought within the time limited after his return. In *Forbes v. Smith*, 30 Eng. L. & Eq. 600, where the statute was pleaded, it was held not to be necessary to aver in the replication that the defendant had returned. The court said that the plaintiff might sue at any time not greater than six years after the return of the defendant, but should he desire to sue before his return, he might take that course. It was conceded that this construction was a departure from the strict language of the statute. In the statute of James there is a saving of the rights of parties in whose favor actions exist; and it is declared that they shall be at liberty to bring their actions within the time of limitation "after they shall have returned from beyond the seas," etc. Suppose the party never returns, but, long after the action accrued, dies abroad. By the terms of the statute the action is barred, and the party is not brought within the saving, for he has never returned, and, being dead, he never can return. That precise question arose in *Townsend v. Deacon*, 3 Exch. 706, and it was held that the executors might maintain the action, though it was admitted that, strictly speaking, the creditor had never returned. In *Ruggles v. Keeler*, 3 Johns. 263 [3 Am. Dec. 482], the question was, whether the statute of limitations of this state had run against a demand contracted in Connecticut when both parties were citizens of that state. The statute was, that if the debtor, at the time the cause of action accrued, should be out of the state, the suit might be brought within the time limited "after the return of the person so absent into the state." It was plausibly argued that, as both parties resided out of the state at the time the contract was made, no return into this state could have been contemplated, and that therefore the case was not within the proviso. The court held, Kent, C. J., giving the opinion, that coming within our jurisdiction was within the meaning of the proviso, though the party had never been here before; and he referred to cases to show that this was the construction which had been put upon the English statute. The same point, in substance, was determined in the English court of common pleas, in 1854, under the statute of James, which, as has been mentioned, allows the plaintiff to maintain an action, which would otherwise be barred, if he sues within the time limited after having "returned from beyond the seas."

The plaintiff was a Frenchman, and had never been in England, and the defendant's counsel argued that he could not return, not having been in England before, and that the exception applied only to persons who could be said to return. The point was held not to be tenable. Maule, J., said: "The courts have taken notice of the scope and intention of the statute of limitations:" *Lafonde v. Ruddock*, 24 Eng. L. & Eq. 239. The same point had been ruled many years before in *Strithorst v. Graeme*, 3 Wils. 145, where the court said that if the plaintiff, who was a foreigner, did not come to England in fifty years, he still had his right of action, and if he never came, but died abroad, his executors or administrators would have it after his death. In *Benjamin v. De Groot*, 1 Denio, 151, a similar question arose under the section of the revised statutes now under consideration. The action was against an executor, and the statute was pleaded, to which there was a replication that the testator resided in Great Britain when the cause of action accrued, and never returned to this state, but died there; that letters testamentary were taken out here on a certain day, and the action brought within six years afterwards. The defendant demurred, and it was argued on his behalf that the twenty-seventh section of the act related only to the case of a defendant out of the state when the cause of action accrued and returning into it, and that it gave the plaintiff six years after his return, but had no application where he died abroad. But the replication was held good, the court saying that though the case was not within the words of the section, it was within its equity. This court, in *Davis v. Garr*, 6 N. Y. 124 [55 Am. Dec. 387], determined the same point in the same way, on the authority of the last-mentioned case, and of *Douglas v. Forrest*, 4 Bing. 686.

There has been a similar course of decision in the courts in Massachusetts. The saving clause in their statute was that "if any person or persons against whom there is or hereafter shall be any cause of suit, etc., who, at the time the same accrued, was without the limits of this commonwealth, and did not leave property or estate therein," that could be attached, "that then and in every such case the person that is entitled to bring such suit or action shall be at liberty to commence the same within the respective periods before limited after such persons return into this government." In *Dwight v. Clark*, 7 Mass. 515, the statute was pleaded, and it appeared by the pleadings that the defendant was an inhabi-

tant of Connecticut when the promises were made, and had never before that been an inhabitant of Massachusetts, and that he did not come to the latter state until after the period of limitation had elapsed. It was argued on his behalf that the exception did not apply, because leaving property and returning to the commonwealth were things which could not be predicated of one who had never lived in Massachusetts. The court, however, said that it was a much more reasonable construction to hold that the exception was intended to be general, and to comprehend all persons who were without the commonwealth, and had not attachable property within it. The point was again affirmed in *Bulger v. Roche*, 11 Pick. 39 [22 Am. Dec. 359].

The course of adjudication established by these cases authorizes us, I think, to carry out the obvious intention of the legislature in the statute before us. We can see no motive which it could have had for discriminating in favor of a foreign corporation, or any indication of an intention so to discriminate. The language of the exception in the first branch of the twenty-seventh section is not in all respects congruous to the case of a corporation; but there is an incongruity nearly as great in applying the phrase "returning into this state" to a person who had never resided here, and quite as great in accommodating it to the case of one who had died abroad, and who could not by any possibility return. If the consequence is that a corporation in another state or country cannot enjoy the advantage of our act of limitation, the same is true of a natural person domiciled abroad, and whose circumstances prevent his coming within our jurisdiction. The policy of our law is that no persons, natural or artificial, who are thus circumstanced, can impute laches to their creditors or those claiming to have rights of action against them in not pursuing them in the foreign jurisdiction where they reside. It was equitable and in accordance with the policy of the law of limitation that when the reason for excusing the creditor from the use of diligence should cease, by the debtor coming into the state, the obligation to use diligence should again attach. In ingrafting this policy upon the statute, the legislature made use of general words which, though adequate to describe a corporation, did not contain any language referring specifically to a debtor who could not, by its constitution, pass from one territorial jurisdiction to another.

The case of *Faulkner v. Delaware & R. C. Co.*, 1 Denio, 441,

was decided without a reference to the authorities which have been referred to or a full consideration of the policy of the act, and should not, I think, be followed.

The judgment of the supreme court must be reversed.

All the judges concurred.

Judgment reversed, and a new trial ordered.

APPLICATION OF STATUTE OF LIMITATIONS TO FOREIGN CORPORATIONS: See *Clarke v. Bank of Mississippi*, 52 Am. Dec. 448, and extensive note thereto citing many cases, among them the principal case. In *Tioga R. R. Co. v. Blossburg & C. R. R. Co.*, 20 Wall. 143, 151; S. C., 5 Blatchf. 390; *In re Sheppard*, 1 Nat. Bank Reg. 116; *Mallory v. Tioga R. R. Co.*, 3 Abb. App. Dec. 142; S. C., 5 Abb. Pr., N. S., 423; 32 How. Pr. 203; 3 Keyes, 355; *Anonymous*, 32 Barb. 203; *Thompson v. Tioga R. R. Co.*, 36 Am. Dec. 80; *Power v. Hathaway*, 43 Id. 217; *Mayer v. Friedman*, 7 Hun, 219; *McCartney v. Bostwick*, 32 N. Y. 58; *Lee v. Selleck*, 33 Id. 618; *Boardman v. Lake Shore & M. S. R'y Co.*, 84 Id. 185; *Stark Ave. R'y Co. v. Gilbert El. R'y Co.*, 41 N. Y. Super. Ct. 511, the principal case is cited to the point that the statute of limitations is not available as a defense to an action against a foreign corporation.

THE PRINCIPAL CASE IS CITED in *Haviland v. Chace*, 39 Barb. 285, and *Ayers v. Lawrence*, 59 N. Y. 196, as an example of the manner in which statutes should be construed so as to effectuate the intention of the legislature.

GOOLD v. CHAPIN.

[20 NEW YORK, 259.]

CARRIER WHO RECEIVES GOODS UPON UNDERTAKING TO DELIVER THEM TO ANOTHER CARRIER for further transportation continues liable as carrier until they are received by such second carrier, or until he in some way distinctly renounces responsibility; as, by depositing them in warehouse. Notifying the second carrier to take the goods, which he does not do, is not a discharge.

APPEAL from a judgment against plaintiff in an action to recover from carriers the value of goods destroyed while in their charge. The facts relative to the undertaking of the defendants and the loss of the goods appear in the opinion. The action appears to have been tried before a referee, who rendered a judgment in favor of plaintiff, which was reversed by the full court: 10 Barb. 612. Upon a second trial, also before a referee, the defendants had judgment, pursuant to the previous decision; and from this judgment the plaintiffs now appealed.

Henry R. Selden, for the appellants.

John H. Reynolds, for the respondents.

By Court, JOHNSON, C. J. Although we cannot fail to see that the destruction of the goods in question was inevitable, and that no blame can be attributed to the defendants for their loss, yet the question whether that loss shall be borne by them or by the plaintiffs must be decided according to the principles which are applicable to the legal relation which the defendants sustained to the goods at the time the fire occurred. The cause and circumstances of the destruction were such as a common carrier is bound to answer for, but not such as suffice to charge a bailee for custody merely. The important inquiry therefore is, whether the goods, at their destruction, were in the custody of the defendants as carriers.

The goods were delivered to the defendants in New York, to be carried to Albany, and there delivered to another carrier, to be transported to Brockport, New York. All this appears from the receipt given on the shipment of the goods, which discloses plainly these facts, and shows that the parties to whom delivery was to be made at Albany were to receive the goods, not as owners, nor as general consignees of the owners, but as carriers. In *Van Santvoord v. St. John*, 6 Hill, 157, it was held that the first carrier's obligation was discharged when he had safely delivered the goods to the next carrier; but that case did not present any question as to what would amount to such a delivery. The same remark is applicable to *Ackley v. Kellogg*, 8 Cow. 223. In both cases the second carrier had actually received the goods, and was chargeable as carrier for their safety. It is found by the referee in this case—and as we have not the evidence we must certainly assume the finding to be well warranted—that the Atlantic line did not receive the goods from the defendants within a reasonable time after notice was given of their arrival, and a request that they should be taken away. Assuming that such notice, if given to the owner at the end of the transit, and the unreasonable delay in taking the goods, would have put an end to the liability of the defendants as carriers; yet, as I think, the cases and the nature of the transaction itself point to a distinction between that case and the case of consignee or second carrier. If an undue refusal to receive by the owner at the end of the transit would justify the carrier in renouncing all further care over the goods, it clearly would not in the case of consignee or subsequent carrier, where these relations were known to the first carrier. In *Ostrander v. Brown*, 15 Johns. 43 [8 Am. Dec. 211], Mr. Justice Platt, giving the opinion of the court, says:

"Suppose the consignees had been dead or absent, or had refused to receive the goods in store, what would have been the carrier's duty? Certainly he would have no right to leave them on the wharf or in the street without protection. He would not be justified in abandoning the goods. He had notice that S. and B. were the owners, and if M. and O. would not take charge of the goods as consignees, he ought to have secured them on board his vessel or in some other place of safety." This was said in a case where the goods were left unprotected on a wharf, and the duty of protection was the only point to be made out.

In *Fisk v. Newton*, 1 Denio, 45 [43 Am. Dec. 649], the goods had been stored, the consignee not being found after due search, and the storekeeper having failed and the goods being missing, the question was whether such storing was a defense to the carrier; and it was held that he was not liable. Now, the goods in this case were transferred from the boat to the float to enable the defendants to complete their contract by making delivery. The float was not a storehouse in the proper sense of that word. It was a part of the machinery to facilitate the business of carriage, which the defendants adopted for their own convenience in performing their contracts to carry and deliver. When the goods were unladen from the boat on which they were brought up the river and placed upon the float, it was a step in performance of the contract to deliver, but not a delivery. The performance was not by that act complete. It was a mode of delivery which undoubtedly promoted the convenience of both sets of carriers, but it did not alter the responsibility of the first carrier, who had not yet made delivery. There was no refusal to receive on the part of the second carrier, but there was unreasonable delay. The defendants, however, did not find this delay so unreasonable as to feel compelled to make any new disposition of the goods. They did not remove them from the exposure of a floating vessel, from different parts of which goods were being delivered to different lines, and place them in store. They indulged the other carriers in the delay, as from the course of business was natural and suitable; and until some act was done on their part indicating a clear purpose to make an end of their relation of carriers as to these goods, I think their responsibility as such continued. No owner can be supposed to have an agent to superintend each transshipment of his goods in the course of a long line of transportation; and if the responsibility of each carrier is not continued until delivery in fact to the next car-

rier—or at least until the first carrier, by some act clearly indicating his purpose, terminates his relation as carrier—we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others with no safeguards save those which the rules of law afford. The stringency of the rules belonging to this species of bailment had its origin in public policy, which long experience has approved as wise and salutary. Any other rule in respect to the duty of carriers at such points of transshipment, when unmodified by custom, than that above contained, would give rise and afford protection to the same class of mischiefs against which public policy has protected the community by the strict responsibility imposed upon carriers in other cases.

S. B. STRONG, J. The defendants did not change their responsibility as common carriers, and adopt that of warehousemen, by removing the goods from their barge to their float, on their arrival at Albany. The change was their own act, without consultation with or notice to the plaintiffs or their agent; the goods were still subject to their control, and there had been no actual delivery. The float was in effect a substituted means of conveyance furnished by the defendants. By placing the goods on that, the transit from the plaintiffs to their agent was not terminated. It was so decided by this court in the case of *Miller v. Steam Navigation Company*, 10 N. Y. 431. In that case, as in this, there had been a removal of the goods from a barge to a float, and Judge Jewett said: "There was nothing to show an intention to store the goods, or anything to justify the defendant to do that, if such had been the intention. The facts and circumstances show conclusively that the defendant, instead of being engaged in storing the goods, was placing them in a situation to deliver them according to its contract. The goods had not been placed entirely in a condition to deliver them when the accident happened. The defendant was at no time discharged of the responsibility which it had assumed as a common carrier."

There is undoubtedly an important difference between that case and the one which I am now considering. In that, there had been no delay by the agent of the intended receiving line in furnishing the requisite means for the delivery of the goods; in this case, there were repeated delays. Notices that the goods were ready for delivery and calling for their reception had been given to the agent of the Atlantic line on three successive days. No canal-boat was sent to the float

to receive the goods on either day; but on the third day the agent, on being served with the notice, "replied that he was then taking some goods from the Eckford line of tow-boats on the river, and that as soon as he got them on he would have them shove up to the float and take on what goods they had for his line." The goods were retained on the float until they were consumed by a fire on the afternoon of the same day. The referee finds that the Atlantic line did not receive (he doubtless meant furnish the means to receive) the goods within a reasonable time after notice from the defendants of the arrival of the goods, and after the defendants had requested the agent of that line to take them away.

The question is, whether by reason of this delay the defendants were relieved from their responsibility as common carriers at the time of the fire. Of course there had been no delivery. The goods were still in possession of the defendants, and subject to their control. If they had the power to change the character of their possession, when was it changed? Not surely at the moment of serving the notice. A reasonable time for taking possession of the goods by the Atlantic line must undoubtedly have first elapsed. If there had been no delay, there could have been no hiatus between the responsibilities of the two. When the responsibility of the defendants had terminated, that of the Atlantic line would have commenced. When goods are forwarded by connecting lines, the owners have a right to consider them under the safeguard of a constant responsibility until they reach their place of destination. If a more lax rule should be established, it would greatly prejudice the interests of the freighters on these extensive lines. To be sure, where there is no partnership between the proprietors of the several lines, they should not be held responsible for the conduct of each other, nor can they be. In this case, the delay of the Atlantic line in receiving the goods did not impose upon the defendants the necessity of retaining possession of them beyond a reasonable time for their reception after service of the notice. They might have unquestionably deposited the goods in a warehouse, and thus have relieved themselves from further responsibility; or they might, as they did, elect to retain them in their own possession. As they chose to retain them, it must have been in their original character as common carriers. If they had intended to make a change, common fairness required that they should have given notice to the Atlantic line to that effect. Even that would have been insufficient, as the agent of that

line had no authority to relieve the defendants except by receiving the goods in behalf of his principals. No great wrong can be done to common carriers in ordinary cases by holding them to their responsibilities as such until they part with the possession and control of the goods, either by delivering them to the consignees or depositing them in a warehouse, where, as in this case, one is accessible. It may subject them to some inconvenience, but it is better to do that than to expose the owners of goods, who are not usually present so as to protect their own interests, to losses by reason of the misconduct or omissions of the managers of the different lines at their places of connection. In this case, the defendants retained the goods on their float probably from an expectation that they would soon be taken by the Atlantic line, and possibly to save themselves the trouble of depositing them in a warehouse. In doing so, they consulted no one, but acted at their own option, and, as I conceive, at their own risk.

It is not intended to decide that common carriers can in no case change their peculiar responsibilities while they retain possession of the goods confided to them. They may not be able with due diligence to find any one to receive the goods in behalf of the owner, and there may not be any safe place of deposit within their reach, and in such case their duties as carriers would end, and they would then become mere ordinary bailees. They may also deposit the goods in their own warehouse, and thus absolve themselves from any further responsibility as common carriers. That, however, can only be where there has been a failure by the owner or his agent to receive them.

There may be exceptions to the general rule as to the delivery of goods where they are conveyed by a railroad company, directed to some station short of the termination of the route, or where they are transported by a steamer to be left at some wharf intermediate the termini of the voyage, and where by their known course of business the carriers can neither give notice to nor seek out the owners or consignees, and where no time can be spared to deposit the freighted goods in a warehouse. In such cases, a delivery at the usual place at the station or on the dock, with notice if the person to receive them is present, or without notice if no one is present to receive any for or on behalf of the owner or consignee, would probably be sufficient. In the present case, however, there is nothing calling for an exception.

The judgment of the court below should be reversed, and there should be a new trial.

COMSTOCK, J., dissented.

SELDEN, J., expressed no opinion.

Judgment reversed, and new trial ordered.

COMMON CARRIER, LIABILITY WHEN GOODS HAVE REACHED DESTINATION, and what delivery will discharge carrier: See *Porter v. Chicago etc. R. R. Co.*, 71 Am. Dec. 286, and note 290, citing other cases. Where goods are received to be delivered to another carrier for further transportation, the carrier's liability continues until the goods are taken by the second carrier, or until the former in some way distinctly renounces his liability, as by deposit in a warehouse; and mere notice to and refusal by the second carrier to take the goods will not discharge the carrier: *Illinois Cent. R. R. Co. v. Mitchell*, 68 Ill. 476; *Northrop v. Syracuse etc. R. R. Co.*, 5 Abb. App. Dec. 389; S. C., 5 Abb. Pr., N. S., 428; *Ely v. New Haven S. Co.*, 6 Id. 78; S. C., 63 Barb. 216; *Fenner v. Buffalo & S. L. R. R. Co.*, 46 Id. 108; S. C., 44 N. Y. 507; *Cook v. Erie R'y Co.*, 58 Barb. 323; *Rawson v. Holland*, 5 Daly, 158; S. C., 59 N. Y. 616; *Rogers v. Wheeler*, 6 Lann. 429; *Hathorn v. Ely*, 28 N. Y. 81; *Johnson v. New York Central R. R. Co.*, 33 Id. 612; *McDonald v. Western R. R. Co.*, 34 Id. 502; *Leonard v. New York etc. Tel. Co.*, 41 Id. 569; *Weed v. Barney*, 45 Id. 347; *Mills v. Michigan Central R. R. Co.*, Id. 625; *Hooper v. Chicago & N. W. R'y Co.*, 27 Wis. 92; *Wood v. Milwaukee & St. P. R'y Co.*, Id. 552; *Conkey v. Milwaukee & St. Paul R'y Co.*, 31 Id. 634, all citing the principal case to this point. The same rule does not apply to the discharge of the master of a vessel as a carrier, and delivery on the wharf or usual place may be sufficient: *Bark Tangier*, 3 Ware, 116, 118; *Salmon Falls Mfg. Co. v. Tangier*, 1 Cliff. 401, both citing the principal case.

BROWN v. MONTGOMERY.

[20 NEW YORK, 287.]

BROKER SELLING COMMERCIAL PAPER MUST DISCLOSE ANY FACTS KNOWN TO HIM adverse to the credit of the parties responsible for the payment of it, irrespective of his opinion upon them; and his failure to do so is a fraud in law, which, if such parties are, in fact, insolvent, constitutes a good defense to an action by the person in whose behalf the paper was sold, against the buyer, for the price.

APPEAL from a judgment of the Buffalo superior court in favor of defendants, sued as makers of a note. The defense was fraud. It appeared that the plaintiff intrusted a check to a broker to be sold, and the broker negotiated a sale of it to the defendants, who gave the note in suit for the price. The drawers of the check had previously been in good credit; but on the day when the sale was made other checks of theirs were

dishonored, of which the broker was informed; but his informant added, that he considered the drawers perfectly good notwithstanding. Trusting to this assurance, the broker made the sale, and took the note in suit, without mentioning to the buyers what he had heard. This concealment constituted the fraud of which the buyers complained. The check was dishonored, and the buyers offered to return it. The judge who tried the cause instructed the jury that it was the broker's duty to communicate to the intending buyers the facts which he had heard, without regard to what he thought; and that if he did not do so, and the parties to the check were then insolvent, the plaintiff could not recover. The full court, in an opinion not reported, sustained this charge, as being accordant with what the court had decided on a former hearing of the cause, and the plaintiff appealed.

Amasa J. Parker, for the appellants.

L. K. Haddock, for the respondents.

By Court, DENIO, J. I think there was no error in the charge to the jury in the superior court. The law unquestionably is, as it was assumed on the argument, that notice to the plaintiffs' agent, Cutting, while he was actually engaged in attempting to sell the check, of the failure of the drawers, was equivalent, so far as the present action is concerned, to notice to the plaintiffs themselves.

What Chard informed him was not precisely that Farnham & Co. had failed, but that their check on the bank at which they kept their account was that day protested for non-payment. This, *prima facie*, was notice that they had suspended payment; for when a business man in a commercial town fails to meet his paper, payable at a bank, and especially his checks upon the bank at which he keeps his account, the natural inference which every one draws is, that he is no longer able to pay his debts. Such a circumstance may occur from oversight or accident, but those are exceptional cases. The failure to meet the paper is itself a suspension of payment, and notice of such a fact, unaccompanied with any explanation which would give it a different character, is notice of the commercial failure of the party. That it was so understood by Cutting and Chard is evident from the fact that they speculated upon the question whether the members of the firm drawing the check would ultimately be able to pay. Upon that question, Chard, as a creditor is apt to do, took the most

favorable view. It is apparent that neither of them expected the check to be paid on presentation when it should mature, five days afterwards. The superior court considered that the confidence which Chard expressed in the ultimate solvency of the members of the firm did not relieve Cutting from the duty of communicating to the defendants the fact that its check had not been met. I am of the same opinion. Up to that time the drawers were in good credit, and their paper of this kind, we are to presume, was promptly met. Thereafter the holders of such paper were to be put upon their legal diligence in the courts, with a fair expectation, perhaps, that they might ultimately be able to obtain payment. The difference between a bank check having five days to run, and which is then to be paid, and a suspended debt against parties who have failed, is sufficiently obvious. The defendants purchased this check as one of the former class, while the plaintiffs' agent well knew that it belonged to the latter, and withheld that knowledge from the defendants.

The plaintiffs' conduct is less censurable, morally, than it would be had it been proved that they personally knew of the failure of the drawers; but in point of law the case is the same as though, after hearing that Farnham & Co. had failed, they took the paper which they held against them into the street, and sold it to parties who had not heard of that event. Such an act could not be justified at law any more than in the forum of conscience. The judge was therefore perfectly correct in instructing the jury that it was the duty of Cutting to communicate to the defendants what he had heard Chard say as to the protest of the other check. He was also correct in advising them that the consequence of omitting to do so was that the plaintiffs could not recover on the note. Where a party negotiates commercial paper, payable to bearer, or under the blank indorsement of another person, he cannot be sued on the paper because he is not a party to it; but he nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless, on account of the failure of the makers, or by its being already paid, or otherwise to have become void or defunct; for, says Judge Story, any concealment of this nature would be a manifest fraud: Story on Promissory Notes, sec. 118.

The plaintiffs' counsel argued that, according to the case of *Nichols v. Pinner*, 18 N. Y. 295, the plaintiffs and their agents were warranted in maintaining silence as to the failure of Farn-

ham & Co., though they knew it, and the defendants did not. But the cases are essentially different. There we decided that where a merchant, knowing himself to be insolvent, purchases goods without disclosing the fact, there being no inquiry made, he is not necessarily guilty of fraud, as he may honestly believe that he can go on and retrieve his affairs. Where so much of the trade of the country is conducted without invested capital, or on borrowed capital, it must often happen that a merchant who is ultimately successful has known periods of commercial disaster when his property would not pay his debts. It would be too strict to hold that under such circumstances he must in all cases go into liquidation, or expose himself to probable bankruptcy by disclosing his condition. But the case does not countenance the position that a dealer who has been of known standing, but who has suddenly failed in business, can go to those who were acquainted with his former character, but who have not heard of his failure, and innocently purchase their property on credit. Judge Selden, in his opinion, puts that case as one not covered by the judgment.

The judge was also right in stating to the jury that the non-payment of the check, spoken of by Chard, was evidence upon the question of the insolvency of the drawers. I have already stated what I consider the necessary inference from such a circumstance among business men. The judgment must be affirmed.

JOHNSON, C. J., and COMSTOCK, GRAY, and GROVER, JJ., concurred.

Judgment affirmed.

SELLER OF NEGOTIABLE PAPER GUARANTEES ITS GENUINENESS, but not the solvency of the parties: *Baxter v. Duren*, 50 Am. Dec. 602, and note 606; *Lyons v. Miller*, 52 Id. 129; but if the vendor, having information that the maker's check upon the bank in which he keeps his account has been protested, fails to disclose such fact, this constitutes a fraudulent suppression of facts which will avoid the sale and be a good defense for an action for the price, if the party is in fact insolvent: *Byrd v. Hall*, 1 Abb. Ct. App. Dec. 287; S. C., 2 Keyes, 646; *Booth v. Powers*, 56 N. Y. 31, citing the principal case. But known insolvency not disclosed by a purchaser of goods, where no inquiry is made of him concerning his solvency, is not of itself sufficient to avoid a sale for fraud, if he makes no misrepresentations, and resorts to no acts or contrivances amounting to fraud or misleading the vendor: *Stilwell v. Swarthout*, 81 Id. 109, distinguishing the principal case from a case of this kind; if, however, a business man of good standing suddenly goes into insolvency just after having purchased a lot of goods, and fails to disclose his insolvency, this may be such evidence of fraud as will avoid the sale: *Johnson*

v. Morrell, 2 Abb. App. Dec. 477; *Van Kleeck v. Le Roy*, 37 Barb. 552; *Viele v. Goss*, 49 Id. 88; *Pike v. Wieting*, Id. 317; *King v. Phillips*, 8 Bosw. 607; *Stewart v. Strasburger*, 51 How. Pr. 400; S. C., 7 Hun, 338; *Voorhees v. Olmstead*, 3 Id. 755; S. C., 6 Thomp. & C. 182; *Schufeldt v. Schnitzler*, 21 Id. 464, all citing the principal case.

DRAPER v. SNOW.

[20 NEW YORK, 381.]

GUARANTY WHICH DOES NOT EMBODY ITS CONSIDERATION (as required by the New York statute of frauds, 2 R. S. 135, sec. 2) cannot be sustained by reference to the contract guaranteed, even though such contract be written on the same paper, and executed at the same time with it, unless it expressly, or by clear implication, refers to such contract as founded on the same consideration.

APPEAL from a judgment of the New York superior court in favor of defendant sued on a guaranty. It appeared that one Hazewell having signed a contract to buy stocks from plaintiff, the defendant at the same time indorsed on it the words, "I guarantee the within contract," signing his name; and that plaintiff thereupon delivered the stocks; but that Hazewell never paid for them. To the complaint on this guaranty defendant demurred, on the ground that the guaranty did not express the consideration; and his demurrer was sustained: 3 Duer, 662. Plaintiff appealed.

William H. Scott, for the appellant.

Henry B. Coules, for the respondent.

By Court, SELDEN, J. Although the complaint in this case avers that the guaranty was executed at the same time with the principal contract, yet if it appear from the complaint itself that the averment is one which could not by possibility be supported upon a trial, the plaintiff cannot avail himself of it upon demurrer. The contract and guaranty are both set forth. If from these it appears, either expressly or by inference, that they were executed at the same time, or if the plaintiff could be permitted upon a trial to prove their simultaneous execution by parol, the averment is available to the plaintiff; otherwise not. It becomes necessary, therefore, to consider these questions.

The guaranty is written at the foot of the contract, upon the same paper; the principal contract being dated, but the guaranty without any separate date. Under these circumstances,

a presumption may arise, in the absence of all proof to the contrary, that the contract and guaranty were both executed at the same time, especially where, as in this case, the consideration of the principal contract is executory; but I will not dwell upon this point, as I entertain no doubt that it would be entirely competent for the plaintiff upon a trial to prove by parol that the papers were simultaneously executed. Whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol; not merely to supply an omission, where the paper itself is without date, but in opposition to the date where it contains one. The time when a contract is executed is no more a part of the contract than the place where it is executed. Both belong to that class of attending and surrounding circumstances which may always be resorted to for assistance in explaining and applying the terms of the contract.

This rule applies to contracts required by the statute of frauds to be in writing, no less than to all other contracts. That statute abrogates none of the rules of the common law, except such as are necessarily in conflict with it. Judge Cowen, speaking on this subject, in *Douglas v. Howland*, 24 Wend. 35, says: "Some of the most difficult cases on the rule respecting the *ambiguitas latens* of written contracts, have arisen on these guaranties. You are to see what they mean in such cases, by looking to collateral facts or surrounding circumstances. You do this in order to sustain the most solemn contracts, such as deeds or wills."

Many other authorities might be cited to the same effect, but it is unnecessary, as I deem the point too plain to admit of serious question.

There is no doubt that the principal contract in this case expresses the consideration with sufficient clearness; and we are to assume upon this demurrer that the guaranty was executed at the same time with it. The case presents, therefore, in the most unmixed form, the question whether, under such circumstances, the consideration expressed in the principal contract can be read as a part of the contract of guaranty, so as to remove the objection arising under the statute of frauds, which requires not only that the guaranty should be in writing, but that the writing should express the consideration of such guaranty: 2 R. S. 135, sec. 2.

There have been several decisions of this court since its organization which bear upon this question; and it will scarcely

be necessary to go beyond these decisions in considering the present case. The plaintiff's counsel, to maintain that the guaranty does express the consideration, insists in his printed points that the principal contract and the guaranty, having been executed at the same time, to the same party, and in relation to the same subject-matter, should "be deemed to have been parts of the same transaction;" and that "the two instruments may be read together as one contract."

The rule here invoked is a familiar one; but three things are essential to its application; viz., the contracts must be executed at the same time, they must relate to the same matter, and must be between the same parties. It is by no means sufficient, as the counsel has assumed, that they should be executed to the same party. A single familiar illustration will sufficiently test this, and show the importance of the distinction. Suppose two insurance companies were to execute separate policies at the same time upon the same property and to the same person, it would scarcely be claimed that the two could be read together as one contract; and yet the case would embrace every element which the counsel, as it would seem from this point, deems essential to that result. The two contracts would be executed at the same time, to the same party, and in relation to the same subject-matter.

In the present case, Hazewell, the principal, and Snow, the guarantor, have both made contracts with the plaintiff at the same time, and relating to the same subject; but Snow is not a party to Hazewell's contract, nor Hazewell to that of Snow; nor are the two contracts identical in substance. Hazewell agrees to purchase certain stocks, and that he himself will pay. Snow agrees neither to purchase nor pay, but that Hazewell shall do both. Hazewell is liable primarily; Snow only in case of his default. The contracts, therefore, are plainly separate and distinct, and cannot be read together as one. To a certain extent, no doubt, the principal contract may be read in connection with and as a part of the guaranty. The latter impliedly refers to the former for a statement of what the guarantor undertakes that the principal shall do. But this implication clearly does not extend to the consideration. That may be the same, or it may be other and different. There can be no presumption in this case that it is the same; and even if there could, that would not satisfy the statute, which requires the consideration to be expressed in the guaranty.

The plaintiff's counsel relies mainly upon the case of *Union*

Bank v. Coster, 3 N. Y. 204 [53 Am. Dec. 280], to support his position. But the decision in that case does not necessarily rest, and cannot, I think, be sustained, upon the doctrine that different instruments made at the same time in respect to the same matter are to be read and construed together; because there as here, one essential circumstance was wanting, viz., an identity of parties. The primary contract in that case and in this are very much alike in respect to the consideration, which is executory in both. But the guaranties are very different. In the case of *Coster*, it was as follows: "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit."

It would be difficult to make two guaranties more unlike in frame and structure than the two under consideration. The guaranty in the present case is entirely silent as to the things guaranteed to be done; that in the *Coster* case contains a pretty full recital of what is guaranteed. Again, the former contains no reference, express or implied, to the consideration of the original contract, or to a consideration of any sort, while the latter may be construed as expressly referring to the consideration of the principal contract. The words, "in pursuance of the above credit," upon one construction, it is true, might be said to be merely descriptive of the paper guaranteed. But they may, when taken in connection with the form of the instrument and the attending circumstances, be held to mean something more. What is the "above credit" referred to? It is not for all drafts drawn by Kohn, Daron, & Co., but such only as should be "negotiated through," that is, taken and discounted by the persons to whom the instrument is addressed. The paper is in the form of a letter, which is to be regarded as addressed to the plaintiff. The presumption is, from the form of the instrument and the nature of the transaction, that there had been no negotiation between the plaintiff and the guarantor before the presentment of the letter to the plaintiff. The guaranty was obviously made with a view to such presentment. Does it not then in effect say to the plaintiff that any drafts drawn as described, which it will consent to take, shall be duly accepted and paid, thus referring to and adopting the consideration of the original contract, viz., the taking and discounting of the drafts, as the consideration of the guaranty? There is an obvious distinction between the principal contracts in the two cases, which materially affect the construction of the guaranties. In the present case, the

instrument is a mere embodiment in writing of what had been previously agreed upon between the parties. Its language is: "I have purchased," etc. There could be no purchase without a sale; and hence the plaintiff must have agreed to sell the stock to Hazwell before the guaranty was executed, and for aught that appears, before any agreement to execute it. In the case of *Coster*, on the other hand, it is manifest from the nature of the transaction that the original credit must have been given after the execution and presentment of the guaranty, and presumptively in reliance upon it; and hence, that the consideration of the guaranty was identical with that of the principal contract.

There is, in the present case, by no means the same ground for a presumption, if that could make any difference, that the credit was originally given upon the faith of the guaranty, and that this credit was contemplated as the consideration of such guaranty, as in the case of *Union Bank v. Coster*, 3 N. Y. 240 [53 Am. Dec. 280]. The plaintiff cannot avail himself of the averment to that effect in the complaint; because, as we have seen, it cannot be inferred from the face of the guaranty, taken in connection with the circumstance that it was executed at the same time with the primary contract; and there is therefore no way in which the fact could be made to appear upon a trial, as it clearly could not be proved by parol. For all these reasons, the difference between the two cases is marked and clear.

The case of *Union Bank v. Coster*, *supra*, in the view which has been taken of it here, is not at all in conflict with the case of *Brewster v. Silence*, 8 N. Y. 207, in which the very question now presented was decided by a nearly unanimous vote, in opposition to the views maintained by the plaintiff's counsel here. There may be reason to apprehend that the rule adopted in the latter case will in its practical operation be productive of some inconvenience, as it will not be easy to impress upon the community at large the necessity of observing that rule in their ordinary transactions. It was probably some consideration of this sort which led the late supreme court of this state to go to the extraordinary length of holding that one who guaranteed the payment of a promissory note was liable as a maker of the note thus guaranteed: *Manrow v. Durham*, 3 Hill (N. Y.), 584; *Luqueer v. Prosser*, 4 Id. 420.

But these cases, which, as has been justly said, stand upon no basis of principle, have been repeatedly overruled, and es-

pecially in the case of *Erewster v. Silence*, 8 N. Y. 207. The plaintiffs' counsel assumes that the case of *Brewster v. Silence*, *supra*, was decided solely upon the authority of that of *Hall v. Farmer*, 2 Id. 553, which, as he insists, settled no principle. It is true that in the case of *Hall v. Farmer*, *supra*, there was no authoritative decision of the court, the judgment having been affirmed by force of the statute alone, upon the third argument, for want of a concurrence by any five of the judges as to the judgment to be pronounced. But the decision in the case of *Brewster v. Silence*, *supra*, was not based upon that case alone, but upon a process of reasoning to which I have not been able to discover any satisfactory answer. Willard, J., by whom the opinion of the court was delivered, says: "The note and guaranty are not one and the same thing. The note is the debt of the maker. The guaranty is the engagement of the defendant that the maker shall pay the note when it becomes due. A joint action will not lie against them both. They are not the same, but different and distinct contracts. If we give effect to the statute, we must treat the guaranty as void for want of expressing on its face the consideration." Although it expressly appeared in that case that the consideration of the note was the sale of a pair of horses, and that the giving of the guaranty was made a condition of the sale, I, nevertheless, fully concur in the decision, as facts of that description can have no influence upon the question except where, as in the case of *Union Bank v. Coster*, 3 N. Y. 204 [53 Am. Dec. 280], they may have a bearing upon the construction to be put upon the terms of the guaranty. Neither the conclusion arrived at in this case, nor the decision in the case of *Brewster v. Silence*, *supra*, is necessarily in conflict with any of the previous cases decided by this court. The case of *Brown v. Curtiss*, 2 N. Y. 225, was put upon the ground, not that the statute had been complied with, but that the contract did not come within the provisions of the statute, and need not have been in writing at all.

The judgment of the superior court, therefore, should be affirmed.

All the judges concurred, except S. B. STRONG, J., who delivered a dissenting opinion.

GUARANTY WHEN REQUIRED TO BE IN WRITING EXPRESSING CONSIDERATION, and when not: See *Union Bank v. Coster*, 53 Am. Dec. 280, and note 286. The rule laid down in the principal case, that if a guaranty does not

embody or express the consideration, it cannot be sustained by reference to the contract guaranteed, though both were written and executed at the same time, unless it expressly or by clear implication refers to such contract as founded on the same consideration, is disapproved by Comstock, C. J., in *Church v. Brown*, 21 N. Y. 315. In that case, he says that *Draper v. Snow* was decided on the authority of *Silence v. Brewster*, 8 Id. 210, without an examination of the authorities, but that he has since examined them, and that he is satisfied that the court was in error, and should have held in those cases that if the guaranty and the contract were executed together, reference being made in the former to the latter, though not expressly referring to the contract as founded on the same consideration, the two constitute one contract, on the theory that writings executed together and referring to each other constitute one contract and must be construed together, and the guaranty, if so executed, sufficiently embodies the consideration as required by the New York statute of frauds: 2 R. S. 135, sec. 2. To the same effect, see the note to *Union Bank of Louisiana v. Coster*, 53 Am. Dec. 288; *Dauber v. Blackner*, 38 Barb. 438; *Lossee v. Williams*, 6 Lans. 233; *Thomas v. Murray*, 32 N. Y. 615. In *Speyers v. Lambert*, 1 Sweeny, 344, S. C., 6 Abb. Pr., N. S., 317, 37 How. Pr. 323, in discussing the object of the statute of 1863, which amended the section of the statute of frauds relating to personal contracts by omitting the words expressed in the consideration, Freeman, J., comments on the principal case, as showing what the law was before that amendment.

THE PRINCIPAL CASE IS CITED IN *Germania Bank v. Distler*, 14 Hun, 633, *Weller v. Hersee*, 10 Id. 434, *Kincaid v. Archibald*, Id. 11, and S. C. on appeal, 73 N. Y. 193, to the point that the date of an instrument is not conclusive evidence of the time of its execution, and that when fraud or mistake is alleged, it may be contradicted by parol evidence; and in *Rogers v. Smith*, 47 Id. 327, to the point that contemporaneous writings between the same parties on the same subject-matter are to be read and construed as one paper.

BEALE v. PARRISH.

[20 NEW YORK, 407.]

NOTICE OF PAYMENT OF NOTE, addressed and posted by a notary in good faith to an earlier indorser, upon information received from a later one, will be sufficient to charge the earlier indorser, although the address given was erroneous and he did not receive the notice.

OMISSION TO SERVE NOTICE OF NON-PAYMENT of a note upon an indorser is excused by the holder's inability to ascertain the indorser's address; but only while his ignorance of the address continues.

INDORSER IS BOUND TO KNOW RESIDENCE OF PRIOR INDORSERS; therefore where an indorser gave his indorsee an erroneous address of a prior indorser, in consequence of which the prior indorser failed to receive notice of non-payment: *Held*, that against the latter indorser the prior indorser was discharged.

APPEAL from a judgment in favor of an indorser of a note against a prior indorser. Beale & Co., being owners of a note already indorsed by Parrish, got it discounted at a bank on indorsing it. When it fell due, payment being refused, the bank's

notary inquired of a partner of Beale & Co. for the address of Parrish, to enable him to send notice of non-payment to Parrish as indorser. The partner answered that Parrish lived at Dunkirk or Buffalo, he did not know which, and advised sending two notices, one to each city, which the notary did, acting in good faith. In fact, Parrish lived at Canandaigua, and did not receive the notice. Beale & Co., as indorsers to the bank, took up the note from the bank, and brought this action to recover from Parrish as an early indorser. Parrish defended on the ground that notice of non-payment had not been given to him. On the trial the plaintiff had judgment, which was affirmed in 24 Barb. 243, and from the judgment of affirmance defendant now appeals.

James C. Smith, for the appellant.

John C. T. Smidt, for the respondent.

By Court, GROVER, J. The first question necessary to be considered in this case is, whether due diligence was used by the notary employed by the Chemical Bank to ascertain the residence of the defendant so as to excuse the service of notice upon him as required by law in favor of the bank, the holder of the note. He inquired at the bank, and ascertained that the officers did not know where he resided, or where notice should be served upon him. He then inquired of Melick, one of the plaintiffs, and one of the immediate indorsers to the bank, and was informed by him that the defendant resided either at Dunkirk or Buffalo, and requested that notice might be directed to him at both places, so as to make a sure thing of it. The notary accordingly deposited the proper notices to the defendant in the post-office at New York, addressed to him at each of those places. I think that was sufficient to enable the bank to recover against the defendant, although his actual residence was at Canandaigua: *Ransom v. Mack*, 2 Hill (N. Y.), 588 [38 Am. Dec. 607]. In this case, it was held that where inquiry was made of the second indorser, as to the residence of the first, and he assumed to know his residence, and informed the notary thereof, who served the notice accordingly, that this was sufficient to charge him, although he resided at a different place. The only difference between that case and the one before the court is that in this case the indorser informed the notary that the defendant resided in one of two places. He assumed to be certain to this extent, and the notary addressed a notice to the defendant at both the places

named, rendering it equally certain to reach him as though but one place had been named and notice had been directed there. In *Bank of Utica v. Bender*, 21 Wend. 643 [34 Am. Dec. 281], it was held that a notice sent by mail to the place designated as the residence of the indorser of a bill of exchange by the drawer, for whose accommodation the bill was indorsed, and for whose benefit it was discounted, was sufficient to charge the indorser, although his residence was at a different place. See also *Catskill Bank v. Stall*, 15 Wend. 364. These cases proceed upon the principle that a party through whose hands negotiable paper has passed is presumed to know the residence of the party from whom he received it, and the prior parties. They are, therefore, proper sources to which to apply for information, and when applied to, and assuming to know, information given by them may with safety be acted upon.

In this case the plaintiffs were duly charged as indorsers to the bank. They were liable as such to pay the note. Having paid and taken the note from the bank, they are presumed to have paid it in discharge of that liability. They then became the holders of the note, invested with the right to resort to prior parties for payment, provided such parties have been duly charged by the service of the requisite notice. A notice given by the holder will inure to the benefit of the other parties to the bill or note: *Stafford v. Yates*, 18 Johns. 327; *Mead v. Engs*, 5 Cow. 303. This is upon the ground that the object of the notice is to enable the party entitled to notice to take the necessary steps to protect himself from loss, and where notice is actually served by any party to the paper, as required by law, this object is accomplished. Not so, however, where the notice is not so served, but the service is excused upon the ground of inability to ascertain the proper place for service, after using due diligence to learn it. In such case the indorser is holden, although deprived of what the law deems an essential benefit to him. Inability to discover the residence of the indorser excuses the proper service only so long as such inability continues. When the residence becomes known to the party wishing to hold the indorser, it is his duty then to be diligent in making service: Ch. Bills, 493. Had the bank continued to hold the note in suit, knowing that the only notice of dishonor to the defendant had been directed to Dunkirk and Buffalo, and had it at any time learned that he resided at Canandaigua, it would then have been necessary for it to have

served notice there in the same manner as though his real residence had been known to the bank when the note became due. The excuse for not serving notice would have ceased, and it could no longer be held that due diligence had been used unless service was made. The law will go no further than necessity requires. The same rule would be applicable to a purchaser from the bank. If this be so, the plaintiffs cannot recover. The case shows that some of them knew the residence of the defendant. That information was contained in the letter inclosing the note to the plaintiff, and was also given to Mr. Beal, one of the plaintiffs, verbally, by Stephen Parrish. The plaintiffs might at once have given the proper notice. One of the plaintiffs (Melick) knew that no notice for the defendant had been directed to Canandaigua. They could at once have served notice. This they neglected to do, and the defendant was thereby discharged.

If I am wrong in the above conclusion—if the rule is that the holder having once used due diligence to learn the residence of the indorser, and having, as he supposes, ascertained it, and served notice accordingly, is not obliged to do anything further, although he may afterwards learn that his information was erroneous, and learn the true residence—it remains to inquire whether the plaintiffs can avail themselves of this right of the bank. As above remarked, they paid the note to the bank in discharge of their liability as indorsers, not as sureties for the defendant. The doctrine of subrogation, in favor of a surety, does not attach. Their suit is based upon the defendant's indorsement to them. To recover, it was necessary to show notice of dishonor served upon the defendant by some party to the note, or that there was a legal excuse for the omission. Such excuse was shown so far as the bank was concerned, but none whatever as to the plaintiffs. They could have at once served the proper notice upon the defendant, upon receipt of notice by them from the bank. While it is settled that notice by the holder to the defendant would have inured to the benefit of the other indorsers, there is no authority holding that an excuse for the omission to serve by the holders shall extend to other parties for whom there is no such excuse. Upon both the above grounds, I think the judgment should be reversed, and a new trial ordered.

JOHNSON, C. J., expressed no opinion.

All the other judges concurred

Judgment reversed, and new trial ordered.

NOTICE OF NON-PAYMENT OF NEGOTIABLE INSTRUMENT, how and where to be made, and proof of service: See note to *Ransom v. Mack*, 38 Am. Dec. 607-616, containing a full discussion of this subject; *Commercial Bank v. Strong*, 67 Id. 714, and note 720. The principal case is cited to the point that the holder of a note is not bound to perform impossibility, and hence in the case of destruction of a note he is excused from presenting it for payment: *Scott v. Meeker*, 20 Hun, 163. In *Davey v. Jones*, 42 N. J. L. 30, the principal case is cited to the point mentioned *arguendo* in the opinion that an agent of a note for collection is recognized in law as a holder for collection for all purposes of demand and notice.

COLEGROVE v. NEW YORK & NEW HAVEN R. R. CO.

[20 NEW YORK, 492.]

RAILROAD CORPORATIONS, BOTH CHARGEABLE WITH NEGLIGENCE CAUSING COLLISION of their trains, are liable to a joint action for damages for injuries sustained by a passenger.

DEMURRER TO EVIDENCE IS NO LONGER IN USE IN NEW YORK, and a refusal to permit one is not reversible error.

APPEAL from a judgment against two railroad companies for damages for injuries sustained by a passenger of one through a collision of their trains. The New York and New Haven and the New York and Harlem railroad companies being in the use of the same track laid in a New York city street, although independent in corporate existence and management, two trains, one belonging to each company, came into a collision, whereby the plaintiff, a passenger in the Harlem company's train, was severely injured. He brought suit against the two companies, alleging and offering proof of negligence on the part of the agents in charge of both trains. On the trial, a motion to dismiss the complaint on the ground that the two companies could not be sued in one action, unless upon proof of a joint act of negligence, or of concurrence in negligence, was overruled; as was also an application to interpose a demurrer to evidence. The judge submitted specific questions to the jury, and on their answers and their estimate of plaintiff's damages, he had judgment.

William Curtis Noyes, for the appellants, the companies.

John Graham, for the respondent, the injured passenger.

By Court, GRAY, J. The principal ground upon which the defense rests is, that the defendants are not jointly liable for the consequences of the collision, though it resulted from the negligence of each company, because the negligence was not joint. Had the collision set in motion a third body, which

in its movement had come in contact with and produced the same injury to the plaintiff, no good reason can be assigned against their joint liability; such a case is, in principle, like the one under consideration.

The defendants have not been in any respect prejudiced by the refusal of the court to permit them to demur to the evidence. The party demurring is bound to admit as true, not only the facts proved by the evidence, but also the facts which the evidence may legally conduce to prove: 2 Dunlap's Pr. 648; and this is precisely what must be admitted on a motion for a nonsuit, or for a peremptory direction that a verdict be rendered. The party nonsuited, or against whom a verdict is ordered, is, upon appeal, entitled to have every doubtful fact found in his favor. No benefit other than delay could result to the defendants by the interposition of a demurrer, which would not be the result of the motion made by them to dismiss the complaint after the evidence on both sides had closed. The demurrer to evidence has long since gone out of use in this state, and ought not any longer to be regarded as a right upon which an exception can be predicated. Thus far we see no ground for disturbing the judgment of the court below. We do not agree to the soundness of the proposition put forth in the charge, "that no fault of the plaintiff could excuse the defendants from liability, unless it had the effect to produce the collision that caused the injury;" and if the question was necessarily involved in the case, we are all of opinion that the judgment should be reversed, but inasmuch as the answers by the jury to the interrogatories propounded by the judge did not involve the plaintiff in any negligence, we think the judgment should be affirmed.

DENIO, J., dissented, upon the ground that a joint action was not maintainable.

GROVER and STRONG, JJ., also dissented, upon the ground that it should have been submitted to the jury to inquire whether the plaintiff was not, by reason of circumstances not set forth in the preceding statement of the facts, guilty, in standing upon the platform, of culpable negligence, which contributed to his injuries and excused the defendants.

Judgment affirmed.

RAILROAD COMPANIES, BOTH CHARGEABLE WITH NEGLIGENCE CAUSING COLLISION of their trains, are jointly liable for damages for injuries sustained by a passenger: *Slater v. Mesereau*, 64 N. Y. 147; *Arctic F. Ins. Co. v. Aus-*

Id., 3 Hun, 197; S. C., 6 Thomp. & C. 66; *Mooney v. Hudson Riv. R. R. Co.*, 5 Robt. 548; *Boyd v. Watt*, 27 Ohio St. 268; and a passenger on one of the trains, who was injured by the collision, cannot be charged with the negligence of the servants of the company in whose cars he was riding: *Robinson v. New York Central etc. R. R. Co.*, 65 Barb. 154; *Perry v. Lansing*, 17 Hun, 37; *Brown v. New York Cent. etc. R. R. Co.*, 32 N. Y. 600; *Transfer Co. v. Kelly*, 36 Ohio St. 92. A separate and a joint liability arises in such cases, and the person injured may at his option sue one or all: *Chipman v. Palmer*, 9 Hun, 619; S. C. on appeal, 77 N. Y. 54; *Ring v. Cohoes*, 13 Hun, 88; *Pallett v. Long*, 56 N. Y. 206; *Arctic F. Ins. Co. v. Austin*, 69 Id. 483; *Masterson v. N. Y. C. & H. R. R. Co.*, 84 Id. 256; *Lull v. Fox & W. I. Co.*, 19 Wis. 102. And where one of the parties contributing to the injury is sued alone, he cannot plead the other's neglect in excuse of his own negligence: *Carpenter v. Central Park R. R. Co.*, 11 Abb. Pr., N. S., 420; *Metcalf v. Baker*, Id. 433; S. C., 34 N. Y. Super. Ct. 12; *Willis v. Long Is. R. R. Co.*, 32 Barb. 402; S. C. on appeal, 34 N. Y. 677; *Beck v. East River F. Co.*, 6 Robt. 86. In *Bronk v. New York & N. H. R. R. Co.*, 3 Daly, 454, the principal case is distinguished, and it is held that where the deceased and another person who was driving, while riding on a wagon, and about to cross a railroad track, neglected to look up or down the track, although if either of them had done so they could have seen the approaching train in time to avoid it, this was such contributive negligence on the part of the deceased as prevented a recovery against a railroad company for a collision with the approaching train. All the above cases cite the principal case.

ON NONSUIT, COURT IS BOUND TO ASSUME TRUTH OF FACTS which plaintiff's testimony legitimately conducted to prove, though their correctness be controverted by the defendant's witnesses: *Ernst v. Hudson River R. R. Co.*, 8 Abb. Pr., N. S., 93; S. C., 32 How. Pr. 77; S. C. on appeal, 35 N. Y. 25; *Imhoff v. Chicago & M. R. R. Co.*, 22 Wis. 684, all citing the principal case.

McCONIHIE v. NEW YORK AND ERIE R. R. Co.

[20 NEW YORK, 405.]

CONTRACT TO MANUFACTURE AND FURNISH ARTICLES from materials to be supplied by the purchaser does not vest the title in him until completion and delivery; and meantime, even though completion is delayed by his unexcused default to furnish the materials as agreed, the articles are at the manufacturer's risk. In the event of their being burned, he cannot recover for labor and materials.

MAXIM, DE MINIMIS NON CURAT LEX, is properly applied so as to authorize the affirmance of a judgment for defendant, where the judgment should have been for plaintiff, if the latter's only advantage would be to recover nominal damages.

APPEAL from a judgment on a verdict taken subject to opinion. The action was founded on a contract, whereby the New York and Erie Railroad Company agreed to take and pay for cars to be built for them by the plaintiff's assignor; the company, however, to furnish the iron boxes needed for the

construction. The company did not furnish the boxes within the time agreed; the contractor repeatedly demanded them, and did all the work that could be done without them; but before the cars could be completed and delivered, his shop was burned (without his fault), and the uncompleted cars were destroyed. This action was brought. The judge directed a verdict for the plaintiff, subject to the opinion of the full court, which held that the only action which plaintiff could sustain was for damages for the failure to furnish the boxes; he could not sue on the contract to take and pay for the cars until he had completed and delivered them; and the company therefore had judgment. The plaintiff appealed.

Dorman B. Eaton, for the appellant.

John K. Porter, for the respondent.

By Court, GROVER, J. The court at general term found the fact that Mallory would have completed the cars had he not been prevented from so doing by the failure of the company to furnish the boxes therefor according to their agreement. Had this been a contract for work and labor to be performed by Mallory for the defendant, and he had been prevented from completing the contract by a failure of the defendant to perform on its part, he would have been entitled to recover for what he had done under the contract: *Koon v. Greenman*, 7 Wend. 121; *Jones v. Judd*, 4 N. Y. 412. That is not this case. Mallory agreed to build for the defendant fifteen lumber cars from materials to be furnished by him, except the boxes, which the defendant agreed to furnish, and the expense of which was to be deducted from the price of the cars. This was in effect an agreement for the sale of the cars, thereafter to be constructed by Mallory, to the defendant, and did not vest any property in the defendant until the cars were completed and delivered: *Andrews v. Durant*, 11 Id. 35 [62 Am. Dec. 55]. In that case, the authorities are cited and very ably reviewed, and it is unnecessary again to examine them upon this proposition.

It then follows that the cars set up, and materials furnished for those not set up, were the property of Mallory at the time of their destruction by the fire. The rule is, that the party in whom the title to property is vested must bear the loss in case of destruction by accident. This rule is not questioned by the appellant, and it is unnecessary to cite the cases establishing it. The defendant cannot be held liable to the plaintiff for the

value of the property destroyed, upon the ground that the title had been transferred by Mallory to the company. The ground of liability of the defendant for the property destroyed, if any, is that the failure to furnish the boxes according to the agreement prevented Mallory from completing and delivering the cars, and rendered it necessary for him to keep the property on hand until it was destroyed by the fire. But this was not the necessary consequence of the failure to deliver the boxes. Mallory might have rescinded the contract and proceeded at once for his damages. The cars and materials would have remained his property, and he could have made any use of them he chose. He could have recovered from the defendant the contract price for the cars, deducting therefrom what it would have cost to complete them, and the value of the materials provided for the cars in the condition they then were. But Mallory was not obliged to take this course. He could insist upon completing the cars, and the defendant could not object to the delay in the delivery so long as that delay was occasioned by the neglect of the company to comply with the agreement on their part. The plaintiff in this case had not put an end to the contract. The court find that he repeatedly called upon the company to furnish the boxes up to the time of the fire. The contract continued in full force between the parties to that time. The fire was accidental, and had no connection with the defendant's breach of the contract; they are therefore not responsible therefor. Had the defendant delivered the boxes on the first of May preceding the fire, and had Mallory proceeded to finish the cars pursuant to the contract, and while so proceeding the fire had occurred, I presume no one would have insisted that the defendant was liable for the loss. I do not see that this case differs in a legal view from the one supposed. Mallory was calling upon the company for the boxes to enable him to complete the cars, electing to continue the contract in force. This disposes of the substantial rights of the parties.

The fact is found that no specific damages were proved to have resulted from the delay of the company in delivering the boxes. The plaintiff proved, and the fact is found, that the defendant violated its contract. The plaintiff was therefore entitled to nominal damages. Judgment should have been given therefor for the plaintiff. No important right is affected by the judgment. The plaintiff, had judgment been given for him for a nominal sum, would still have been subjected to

costs. The verdict was subject to the opinion of the court. This court should give such judgment as the supreme court ought to have given. I think this a proper case for the application of the maxim, that the law does not regard trifles, and that the judgment should be affirmed.

SELDEN, J., expressed no opinion.

All the other judges concurred.

Judgment affirmed.

PROPERTY IN ARTICLE OR VESSEL TO BE BUILT OR MANUFACTURED, WHEN PASSES: See *Andrews v. Durant*, 62 Am. Dec. 55, and note thereto fully discussing this subject, 65-68.

THE PRINCIPAL CASE IS CITED in *Meyer v. Hallock*, 2 Robt. 288, *Grube v. Schultheiss*, 57 N. Y. 670, and *Tyng v. Fields*, 3 Hun, 80, to the point that if a contract, instead of being for the manufacture of an article out of materials to be furnished by the purchaser, is for work and labor to be performed, if the workman is prevented from performing his contract, or delayed therein by the other party, he is entitled to recover for what he has done under the contract.

NEW TRIAL WILL NOT BE GRANTED because judgment was for defendant, if the verdict should have been for plaintiff, with nominal damages only: *Nolan v. Harris*, 52 How. Pr. 409; *Willson v. McEvoy*, 25 Cal. 174, citing the principal case.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WILLIAMS v. SADLER.

[4 JONES'S EQUITY, 373.]

EQUITY IN GENERAL WILL RESTRAIN EXECUTION, but will allow the plaintiff to proceed to a judgment at law. If plaintiff in equity alleges that he believes the answer will afford discovery material to his defense at law, an injunction to stay the trial at law ought to be granted.

WHILE PRESSING HIS RIGHTS IN COURT OF LAW, and resisting the claims of his adversary before that tribunal, a party cannot carry the matter into a court of equity.

APPEAL from an interlocutory order continuing an injunction. The facts are stated in the opinion.

Guion, for the plaintiff.

Boydén and Osborne, for the defendant.

By Court, PEARSON, C. J. In March, 1853, the parties enter into a covenant; Sadler to convey to Williams a lot in the town of Charlotte, at the price of three thousand two hundred and fifty dollars; Williams to erect a hotel on the lot; Sadler to rent the hotel for five years at ten per cent per annum on the cost. At the expiration of the second year the lease was surrendered, and Sadler sold the furniture to Williams at the price of two thousand three hundred dollars. The parties, differing as to the amount of the rent, agree to leave that matter to arbitration, and by an award it is fixed at two thousand three hundred and thirty-six dollars and eighty-six cents for the two years. Sadler brings an action for the price of the furniture, and judgment is rendered for one thousand four hundred and forty-seven dollars and ten cents balance, after

deducting set-offs; he is also prosecuting an action for the price of the lot. Williams, on his part, is prosecuting an action at law against Sadler for the amount of the rent, which he alleges is about five thousand dollars. In bar of this suit, Sadler relies on the award. Thereupon Williams files this bill, the object of which is to bring the whole matter into a court of equity, on the ground that it is so complicated that a court of common law cannot do complete justice, and on the further allegation that the plaintiff is entitled to many equitable set-offs, which were not allowed in the action for the price of the furniture; that the award is void, because the plaintiff had no notice, and that Sadler is insolvent. The prayer is for an account of all the several matters and for a conveyance of the lot; and as ancillary to the relief sought, the plaintiff asks for an injunction against an execution on the judgment that the proceedings in the action for the price of the lot be stayed, and that Sadler be restrained from relying on the award as a bar to the plaintiff's action for the rent.

The answer avers that on the trial of the action for the price of the furniture, Williams was allowed all of the set-offs which he claims, as well equitable as legal; that the defendant tendered a deed for the lot, which he is still willing to deliver; that the plaintiff had due notice of the time of making the award, and handed to the arbitrators his estimates of the costs of the hotel, which were duly considered by them in connection with a like statement handed in by the defendant; that the balance, one thousand four hundred and forty-seven dollars and ten cents, the price of the furniture fixed by the judgment, is justly due, and also a large balance on the price of the lot, after deducting the amount of the award; so the plaintiff is indebted to the defendant; and he further denies the allegation of his insolvency, and avers that he owns another lot of the value of one thousand dollars.

A motion to dissolve the injunction that had issued, according to the prayer of the bill, was, *pro forma*, refused, and the injunction continued over until the hearing, from which order the defendant appealed. There is error. The decretal order must be reversed, and the injunction dissolved.

In respect to the execution of the judgment at law: The equity growing out of the alleged right to set-offs is fully denied, and without any evasion, the defendant answers that all of the equitable set-offs which are specified in the bill were allowed on the trial at law, and the award of the plaintiff's

claim thereby reduced from two thousand three hundred dollars, the price of the furniture, to one thousand four hundred and forty-seven dollars and ten cents.

In respect to the action for the price of the lot, the injunction staying the trial at law was improvidently granted. It is the ordinary course to restrain the execution, but allow the plaintiff to proceed to judgment at law; and it is only upon an averment in the bill that the plaintiff in equity believes the answer will afford discovery material to his defense at law, that an injunction to stay the trial ought to be granted: *Adams' Eq.* 195.

In this case, the plaintiff was bound by his covenant to give a note for the price of the lot, which he has failed to do, and now seeks to prevent the defendant from getting a judgment at law.

As a preliminary to coming into this court, it was necessary for him to confess judgment for the price of the lot.

The defendant had at least a right to go that far. In respect to the award, according to the plaintiff's own showing, it was void, and did not stand in the way of his action for the rent; so he has adequate relief at law; and if he did not wish to proceed with his action and encounter the award in a court of law, all he had to do was to take a nonsuit and file a bill. In short, this proceeding on the part of the plaintiff was misconceived. If the several matters had been so complicated that a court of common law could not do complete justice, and the plaintiff desired to have an account, taken under the direction of this court, and to have a title for the lot, he ought, in order to get a footing here, to have confessed a judgment for the price of the lot, so as to put an end to that action, and to have stopped his own action by a nonsuit, and then, being out of that court, he could have come into this, to get title, and for an adjustment of the whole matter; and by way of being rid of the award, he could set out the matter of impeachment, which, if sustained, would leave the question as to the cost of the building, etc., open for adjustment by a reference. But he is not at liberty, according to the course of this court, to have two actions pending at law, and produce a multiplicity of suits, by coming into this court in respect to the same matters of controversy.

This opinion will be certified.

Decree accordingly.

IN EQUITY, INJUNCTION TO STAY TRIAL will be given only when the plaintiff alleges in his bill that he believes the answer will afford discovery material to his defense at law. The principal case is cited and approved on the above doctrine, in *Hunt v. Sneed*, Phill. Eq. 351; *Johnson v. McArthur*, 64 N. C. 575. In *Floyd v. Gilliam*, 6 Jones Eq. 183, it is cited and distinguished.

ROPER v. ROPER.

[5 JONES'S EQUITY, 16.]

IN CONSTRUING WILLS, GENERAL RULE IS THAT PERSONS DESCRIBED as a class take as if each individual composing the class had been called by his proper name, and that each takes a share with other persons named, among whom the division is to be made. There is an exception to this rule, that if there be any thing in the will indicating that the testator intended that the persons described in the class shall take as a unit, then the division shall be *per stirpes* and not *per capita*.

WHEN WILL DIRECTS DIVISION OF PROPERTY, but does not specify any time in which it shall be made, it must be made as soon after the death of the testator as the executors are ready to make a final settlement of the estate.

WHEN WILL ESTABLISHES FUND which is to be divided among children of a certain person born, or to be born, any child who shall come of age and demand his share may be required to give security to refund, if the birth of another child shall render it necessary.

THE facts are stated in the opinion.

R. H. Battle, for the plaintiff.

Ashe, for the defendant.

By Court, BATTLE, J. The bill is filed by the plaintiffs, as executors of Thomas Roper, for the purpose of obtaining the advice of the court as to the proper construction of the thirteenth clause of the will of their testator. That clause is in the following words: "I will and direct that all cash in hand, etc., and every other species or description of property, not otherwise devised or named in this will, that I may own at my death, shall be divided equally among the following heirs: My son John W. Roper, my grandson John T. Roper, Mourning Capel's children, that she has now, or may hereafter have, Nancy Tyson's children, that she has now, or may have hereafter, Martha Gay's children, that she has now, or may hereafter have, James T. Roper's children, that he has now, or may have hereafter, each one to share an equal proportion, share and share alike."

The first and main question is, Do the children of the testator's three daughters, and those of his son James, take *per capita* with his son John W. Roper, and his grandson John T.

Roper? or do the legatees mentioned in this clause take *per stirpes*?

The general rule in bequests of this kind is, that the persons described in a class take in the same way as if each individual composing the class were called by his proper name, and, therefore, that each takes a share with the other persons named, among whom the division is to be made. This is clearly shown by the cases of *Northey v. Strange*, 1 P. Wms. 340; *Blackler v. Webb*, 2 Id. 383; *Ward v. Stow*, 2 Dev. Eq. 509 [27 Am. Dec. 238]; *Bryant v. Scott*, 1 Dev. & B. Eq. 155 [28 Am. Dec. 590], to which the plaintiff's counsel has referred us. But there is an exception to the general rule, quite as well established as the rule itself, that if there be anything in the will indicative of the intention of the testator that the persons described in a class shall take as a unit, then the division shall be *per stirpes*, and not *per capita*: See *Bivens v. Phifer*, 2 Jones L. 436, where most, if not all, the preceding cases in this state on the subject are referred to; and see also the subsequent case of *Lowe v. Carter*, 2 Jones Eq. 377; *Gilliam v. Underwood*, 3 Id. 100; and *Lockhardt v. Lockhardt*, Id. 205. The only inquiry in the case now before us, then, is, whether the will affords any indication of the testator's intention that the division which he has directed shall be *per stirpes* instead of *per capita*, and we are clearly of opinion that there is. The clause in question, it will be perceived, not only provides for the existing children of the three daughters of the testator, and of his son James, but also for such as they might have at any time thereafter. Such a provision it is competent for a testator to make, as we have recently decided in *Shull v. Johnson*, 2 Id. 202; and *Shinn v. Motley*, 3 Id. 490.

If, then, a division is to be made *per capita* between the children of the daughters, and of the son James, and the son John W. Roper, and grandson John T. Roper, the respective shares of the two latter would be altered and diminished with the birth of each after-born child of the testator's daughters and son James. Such a result would be very inconvenient, and could have hardly been in the contemplation of the testator. He might very well intend, and no doubt did intend, that the shares to which each family of children should be entitled should be distributed among all the children whom their respective mothers and fathers might have at any time during their lives, which would, of course, cause those shares to vary as each successive child came into being. In every family, the

amount which any child may reasonably expect from the bounty of his parents is necessarily diminished with the increase of the numbers of his or her brothers and sisters; and in the same way, a fund which a testator may bestow upon a class of persons, each of whom will be equally near to him in blood or affection, may very properly be so given as to be subject to a new division as the class is enlarged by the birth of other children. The inconvenience of such an arrangement is the necessary consequence of a provision by means of a common fund for after-born children. If confined as to each share to a single family, the inconvenience will not be very great, but if it be extended to a number of persons and families, all of whom are to be affected by the coming into existence of a new participant of the fund, it will be almost intolerable, and the court must suppose that no testator intended it, unless the language of his will is too plain to admit of any other interpretation. In the present case, we think the clause of the will which raises the difficulty does admit of another interpretation which is quite as consistent with the letter and much more in accordance with the spirit of the language which the testator has employed to express his intention. The property mentioned in the clause is directed to be "divided equally among the following heirs." The question is, what is meant by the word "heirs;" for it is manifest that the expression "each one to share one equal proportion, share and share alike," refers to "each one" of those whom the testator calls "heirs." We cannot say that the meaning of the term "heirs" is clear of doubt, but we are of opinion that the strong probability is that the testator intended, by the use of that term, to signify that John W. Roper was one heir, his grandson, John T. Roper, was a second heir, the children of his daughter, Mourning Capel, were together a third heir, in the place and stead of their mother, and so on. We the more readily adopt this construction because the testator takes notice, in other parts of his will, that his three daughters, Mourning Capel, Nancy Tyson, and Martha Gay, and his son James, were alive, and he would more properly have called them "his heirs," if he had not preferred to give the property mentioned in the thirteenth clause to their children instead of to them. The grandchildren could in no sense be heirs to the testator during the lives of their mothers and fathers, but the testator could, without any great impropriety, call them so when he substituted them in the place of their parents. But in doing this, he would necessarily mean

that each class of children should represent the respective mothers and father, and take what each mother and father would have done had the property been given to them instead of their children. The conclusion is, that the division directed by the clause in question must be *per stirpes*, and not *per capita*.

The main question upon which the executors desire the instruction of the court being thus settled, there is no difficulty in disposing of the others.

No time for the division being fixed by the will, the parties were entitled to have had it made as soon after the death of the testator as the executors were ready to make a final settlement of the estate.

The shares to which the children of the daughters and son James are respectively entitled may be paid over to their respective guardians. The share of each class will be subject to division among the children born, or to be born. When any child of a class shall come of age, and demand his share, he may be required to give security for refunding, if the birth of another child, in his class, shall render it necessary.

Decree accordingly.

THE RULE STATED IN THE PRINCIPAL CASE IS APPROVED in *Feimster v. Tucker*, 5 Jones Eq. 69; *Burgin v. Patton*, Id. 425; *Chambers v. Reid*, 6 Id. 304, all citing the principal case, and also citing other cases to the same point.

LEGACIES, WHEN TAKEN *PER STIRPES* AND WHEN *PER CAPITA*: *Collier v. Collier*, 55 Am. Dec. 653.

ELLISON v. COMMISSIONERS.

[5 JONES'S EQUITY, 57.]

WHERE APPREHENDED NUISANCE IS DUBIOUS OR CONTINGENT, equity will not interfere, but will leave complainant to his remedy at law.

BURYING DEAD IN PUBLIC CEMETERIES is not a nuisance, but might become so by careless and improvident modes of interment. Equity will not interfere unless the nuisance be clear, or has first been established in a court of law.

MOTION to dissolve an injunction. Defendants are commissioners of the town of Washington. In pursuance of law and the expressed wish of the people of said town, they contracted to purchase a tract of ground, one mile from said town, with the design of laying it off for a public cemetery. After this purchase, but before the deed was executed, plaintiff purchased a piece of land adjoining the proposed cemetery, and

built him a house thereon. This he did with full knowledge of what the commissioners had done and intended to do with the contiguous tract. The other facts are sufficiently stated in the opinion. The court refused to dissolve the injunction, but made it perpetual. Defendant appealed.

Warren, for the plaintiff.

Donnell and Rodman, for the defendants.

By Court, MANLY, J. The subject of nuisances, private as well as public, has undergone much discussion in the courts during the past few years. Amongst other principles established is one which we think definitive of the rights of the parties now before the court.

It is settled in respect to private nuisances, that where the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law: See *Drewry on Injunctions*, 242; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Attorney-General ex rel. Bradsher v. Lea*, 3 Id. 302; and *Simpson v. Justice*, 8 Id. 115.

A consideration of the subject-matter of this complaint, as disclosed by the pleadings, leads us to the conclusion that a place of interment of the dead is not necessarily a nuisance, but that this must depend upon the position and extent of the grounds, and especially upon the manner in which the burials are effected. The cemeteries which have been established near the principal cities and towns of our country (and which it is the commendable purpose of the Washington corporation to imitate) have sprung from the idea that open space, free ventilation, and careful sepulture, not only prevent such places from becoming nuisances, but make them attractive and agreeable places of resort. The dead must be disposed of in some way, and burial in the earth, suggested by the received revelation of man's origin and destiny, is that most generally resorted to. The commissioners of the town of Washington have selected a spot outside of the town, in obedience to the act of assembly and the vote of the citizens, and, so far as we can perceive, it is fitting and appropriate for that purpose.

If the grounds be arranged and drained, and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance, either public or private. The word "nuisance" is, of course, used here in its legal sense, and is confined to such matters of annoyance as the law recognizes and gives a remedy for. The unpleasant

reflections suggested by having before one's eyes constantly recurring memorials of death is not one of these nuisances. Mankind would, by no means, agree upon a point of that sort, but many would insist that suggestions thus occasioned would, in the end, be of salutary influence. The death-head is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutary monitor. The nuisance which the law takes cognizance of is such matter as, admitting it to exist, all men, having ordinary senses and instincts, will decide to be injurious.

The plaintiff's right to the redress he seeks is put upon one other point, which is, that the cutting away the forest growth from the slope of land owned by the defendants will expose plaintiff's residence to unobstructed currents of miasma from the marshes south of him.

This position is too broad to be tenable, for it goes to the extent of empowering neighbors to prevent each other from reducing to cultivation all marsh lands similarly situated. The first effects of the process of preparing such lands for use is probably injurious to health. By exposing them to the action of the sun, the exciting causes of disease are more abundantly developed, and consequently disease is more frequent. But the ultimate effects are otherwise. Drainage and cultivation are healthful; and he who ditches and dries the fertile low grounds of the country is a public benefactor. This point, though made in the pleadings, was not relied upon in the argument, and we dismiss it without further remark.

There is a fact which we think weakens the equity of the plaintiff's bill. He bought and settled on his land after defendants had contracted for theirs, the purpose for which they wished it being known to him. Now, although this is not taken to be conclusive against the plaintiff's equity, it is matter which ought to weigh something, and turn the scale in a doubtful case. What he complains of as a nuisance has not been obtruded upon him, but he has met it half-way. Are we not at liberty to infer his apprehensions of injury are either not entertained at all, or are greatly exaggerated?

The plaintiff has succeeded to all the rights of his vendor, when these rights are ascertained. In defining them, it is proper for us to consider how and through whose agency the transaction occurred, out of which they sprung.

The plaintiff sought the contract, and he ought not to invoke the court to protect him from what he says are the neces-

sary consequences of it. He cannot rightfully complain if equity decline interfering to remove or restrain defendants, and thus prevent the effects of the contract. He ought, at least, before he asks for such interference, to establish at law the injury he alleges.

Public cemeteries, for the orderly and decent sepulture of the dead, are necessary requirements for all populous towns. In fixing sites for them, private must yield to public convenience, and the courts will be particularly careful and not interfere to prevent such establishments, unless the mischief be undoubted and irreparable. Our conclusion is, that burying the dead in public cemeteries is not necessarily a nuisance, but might become so by careless and improvident modes of interment. It is, at most, a doubtful or contingent nuisance, and in such cases the courts of equity will not interfere to prevent, but will leave complainants to establish, the nuisance by an action at law, when it shall arise.

The pleadings satisfy us that plaintiff voluntarily placed himself by the side of the grounds selected for this establishment, and thus put himself in contact with an apprehended nuisance.

And therefore the court will not interfere to restrain defendants in the use of their grounds for the purpose intended, unless the nuisance be clear, or unless, as stated before, it shall be established at law.

Having disposed of the interlocutory order appealed from in favor of the defendants upon its merits, we deem it unnecessary to notice the objection to the frame of the bill in making the parties.

Let the order appealed from be reversed, and the injunction be dissolved, and let this be certified to the court below.

Decretal order reversed.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED IN *Clark v. Lawrence*, 6 Jones Eq. 85, and its doctrine is approved in that case.

WHEN NUISANCE APPREHENDED IS DUBIOUS OR CONTINGENT, equity will not interfere, but will leave complainant to his legal remedy: *Dorsey v. Allen*, 85 N. C. 362, citing the principal case: *Dumerail v. Dupont*, 68 Am. Dec. 751; *Kirkham v. Handy*, 54 Id. 45; *Dargan v. Waddill*, 49 Id. 421.

NUISANCE, WHAT CONSTITUTES, GENERALLY, is discussed in *Burditt v. Swenson*, 67 Am. Dec. 665, and note 669; *Coker v. Birge*, 54 Id. 347; *Castlin v. Valentine*, 39 Id. 567; *Fish v. Dodge*, 47 Id. 254.

COURTS OF EQUITY SOMETIMES WILL INTERFERE TO PREVENT ERECTION OF APPREHENDED DANGER, as the erection of a hospital or powder-mill:

Wolcott v. Melick, 66 Am. Dec. 790, where the subject of nuisances generally is discussed. See also note Id. 799.

ERECTION OF PUBLIC CEMETERY WILL BE RESTRAINED whenever it is made to appear that it is to be located where it will endanger the health of the public, or any member thereof: *Clark v. Lawrence*, 6 Jones Eq. 86, citing the principal case; but where the nuisance apprehended is contingent or dubious, equity will not interfere, but will leave the injured party to his remedy at law: *Dorsey v. Allen*, 85 N. C. 362, citing and approving the principal case; *Dumesnil v. Dupont*, 68 Am. Dec. 750, note 755.

McDONALD v. McDONALD.

[5 JONES'S EQUITY, 211.]

ASSIGNMENT OF MERE EXPECTANCY will be given effect in equity, not as a grant, but as a contract, entitling the assignee to a specific performance as soon as the assignor has the power to perform it.

In equity. Margaret McDonald died in 1855. In 1849 plaintiff sold to his nephew, the defendant, all claim in expectancy to her estate that he might acquire as her heir at law or legatee, and executed to him a deed therefor, for which he received one thousand dollars. The other facts are sufficiently stated in the opinion.

Fowle, Kelly and William McL. McKay, for the plaintiff.

J. H. Bryan and K. P. Battle, for the defendant.

By Court, BATTLE, J. The proofs satisfy us beyond a doubt that the instrument which the plaintiff seeks to impeach was obtained by the defendant fairly and without fraud, or the exercise of any undue influence; that the plaintiff was, at the time when he executed it, entirely capable in law to do so; that he fully understood its import and meaning; and that the consideration which he received for it was, under the circumstances, fair, if not fully adequate. It cannot therefore be set aside either upon the ground of fraud, undue influence, want of capacity in the assignor, or for a defect of consideration. If, then, the plaintiff be entitled to the relief which he seeks, either in whole or in part, it must be because the instrument in question is inoperative, either because there was, at the time when it was executed, no interest in him upon which it could operate, or because it is illegal as being against the policy of the law; or if neither of these objections be good, that it does not convey or bind the whole of the plaintiff's interest in the estate of the defendant's intestate.

It is very clear that, at the time when the instrument was executed, it could not operate as a conveyance or assignment of what it purported to transfer. Margaret McDonald, the defendant's intestate, was then living, and the plaintiff had but a mere possibility or expectancy of an interest in her estate. He was at the time one of her nearest blood relations, and had a chance, by outliving her, to become entitled to a part or to the whole of her estate as heir at law and next of kin, but he had no interest, or possibility coupled with an interest, in it. It follows as a matter of course that he did not have anything which he could assign or transfer to another either at law or in equity. But he had a right to make a contract to convey whatever interest he might in future have in his cousin's property, and such a contract, when fairly made upon a valuable consideration, the court of chancery will enforce whenever the property shall come into his possession. Thus it is said, and the assertion is well sustained by the authorities both in England and in this country, that "chancery will give effect to the assignment of a mere expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance, as soon as the assignor has acquired the power to perform it:" See the American edition of White & Tudor's Equity Cases, 72 Law Lib. 202 and 224, which cites *Hobson v. Trevor*, 2 P. Wms. 191; *Beckley v. Newland*, Id. 182; *Wright v. Wright*, 1 Ves. sen. 409; *Allston v. Bank of South Carolina*, 2 Hill Ch. Cas. 235; *Breckenridge v. Churchill*, 3 J. J. Marsh. 13; see also Smith on Real and Personal Property, 457, and Fry on the Specific Performance of Contracts, 100 Law Lib. 263, and the cases particularly of *Wiseman v. Roper*, 1 Ch. Rep. 154; *Alexander v. Duke of Wellington*, 2 Russ. & Myl. 35; *Persse v. Persse*, 7 Cl. & Fin. 279; *Hinde v. Blake*, 3 Beav. 235; and *Meek v. Kettlewell*, 1 Phill. 347.

It is true that the policy of giving effect to contracts of this kind against expectant heirs has been doubted by very eminent judges; and Chief Justice Parsons, in *Boynston v. Hubbard*, 7 Mass. 112, refused to sanction an assignment made by a nephew in the life-time of his uncle of his expectant interest in that uncle's estate. But the doctrine is now too well established to be disregarded, and the authorities to which they refer fully sustain White & Tudor in saying that "a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may

become entitled under an appointment, or in personal estate as presumptive next of kin of a person then living, is assignable in equity for a valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced.

Having decided that the instrument in question is binding upon the plaintiff, it only remains for us to inquire what is the extent of the interest upon which it operates. It is contended by the plaintiff's counsel that at most it can bind only the apparent expectant interest which the plaintiff had in his cousin's estate at the time it was executed, which, as his brother Neil was then alive, was only one half. The language of the instrument is as broad and extensive as it could well have been made, and embraces everything which in any possible contingency could accrue to the grantor from the estate to which it relates. It is quite probable that neither party fully considered what might eventually come within its operations, but they agree to take the chances, and they must now abide by the result. Had the plaintiff died before his brother in the life-time of the intestate, or had they both died before her, then the defendant would have taken nothing by his contract. Had both brothers outlived their cousin, the defendant could have claimed under the assignment only one half of the estate, but as the events occurred which were most favorable to him, he gets all.

The result is, that the plaintiff has no equity in the claim which he prefers. If he had in any way obtained the possession of the property of the intestate, the court of equity would have compelled him to convey it to the defendant; and it follows, as a necessary consequence, that as it is already in the hands of the latter, the court will not aid the plaintiff in getting it from him.

Bill dismissed, with costs.

THE DOCTRINE OF THE PRINCIPAL CASE IS FULLY DISCUSSED in *Needles' Ex'r v. Needles*, 70 Am. Dec. 85, and authorities collected by the court; but that case involved more particularly the right of a husband to release an expectancy of his wife, and it was held that such a release or assignment only placed the grantee in the same condition as the husband himself, and if the husband died before the expectancy became a vested right, the assignment, etc., failed, for the reason that there was never any right of property in the subject-matter in the husband.

RELEASE BY HEIR APPARENT with covenant of non-claim, made fairly and with consent of ancestor, is binding on heir: *Curtis v. Curtis*, 63 Am. Dec. 651, and note 654.

EXPECTANCY OR MERE POSSIBILITY IS NOT ASSIGNABLE, but equity will give them effect, as held in the principal case: See *Needles's Ex'r v. Needles*, 70 Am. Dec. 85, and note 96.

RELEASES OF EXPECTANCIES are fully discussed in note to last-mentioned case, 70 Id. 97, where authorities are collected.

POSTON v. GILLESPIE.

[5 JONES'S EQUITY, 258.]

PARTY HAVING CONTRACTED WITH ANOTHER TO MARRY cannot give away his or her property without the consent of the other party to the marriage contract.

NOTICE TO ONE PARTY TO MARRIAGE CONTRACT that the other has given away property after entering into the contract, but before marriage, will not hinder the injured party from insisting on the invalidity of the gift.

BILL in equity for an injunction, and to set aside two deeds claimed to be in fraud of plaintiff's marital rights. The facts are sufficiently stated in the opinion.

Fleming, for the plaintiff.

Boydén and Jones, for the defendants.

By Court, PEARSON, C. J. The plaintiff and Mrs. Gillespie had entered into an agreement to marry, and the day for its solemnization was fixed. Three days before the time fixed for the wedding, her father induces her to convey all of her property, except the negro woman, in whom she had but a life estate, to the defendant, Lueco M. Gillespie, her infant son, who was before sufficiently well provided for by his father's will. After procuring this conveyance, the father still determined to prevent the marriage if he could. He starts off with her to Virginia. In Davie county, at the house of a relative, she becomes too much indisposed to proceed on the journey. The plaintiff goes there and has an interview, and learns from her the fact that she had been induced to execute the conveyance of her property to her son. Both the plaintiff and Mrs. Gillespie still insist that the marriage should take place. Whereupon she goes back home with her father, and the marriage is solemnized shortly thereafter.

Roper, in his treatise on husband and wife, upon an examination of the cases, comes to this conclusion: "It is presumed, therefore, that without the consent of the intended husband, the law will not permit any disposition of the wife's property to be made before the marriage then in contemplation, and

that, under no circumstances, after a treaty of marriage has commenced, will any such voluntary disposition of her property be binding on her subsequent husband. In the absence of other evidence of fraud, the time when the disposition or settlement was made must decide its validity, and attention to this circumstance will, as it is presumed, reconcile the principal cases:" 1 Roper on Husband and Wife, 164. This passage in Roper as been cited by this court with approbation in several cases, but it was never before necessary to decide the precise point which is now presented, *i. e.*, Does notice of the conveyance made by the wife, imparted to the husband at any time before the marriage is solemnized, defeat his right to have the conveyance set aside? Or is it necessary, in order to bind him, that, after receiving notice, he should concur and give his consent thereto, which is usually done by his signature on the conveyance?

Spencer v. Spencer, 3 Jones Eq. 404, after reciting the passage from Roper, and making a reference to the other cases in which it is cited with approbation, is put on the ground that the notice is vague and indefinite. *Taylor v. Rickman*, Busb. Eq. 278, where the husband actually signed the conveyance, is put on the ground of surprise, because the paper was presented to him after the parties had met together for the purpose of being married.

The question depends on the time when the disposition or settlement is made, and the principle is this, if a woman, before she has a marriage in contemplation, gives away her property, the man who afterwards marries her has no ground of complaint on which he can stand before this court, although he married, expecting to get the property, and without notice of the disposition previously made by her.

After the courtship has begun, that is, after the man has signified his intention to address the woman, and before the matter is concluded by her acceptance of the proposition, if she give away her property, and he has notice thereof, and still proceed in his courting, the disposition is binding upon him, although he did not concur and give his consent; because at the time of his notice he was not committed by a contract to marry, and his equity can only be put on the ground that he was deceived, which is repelled by the naked fact of notice, as in an action of deceit in the sale of a horse, where it is proved that the vendee has notice of the defect before the trade was closed.

After the courtship, or negotiation about and concerning the marriage, is concluded, and the parties bind themselves by a contract to marry, neither can give away his or her property without the consent of the other, and the matter does not then rest upon a mere question of deceit, which may be repelled by proof of notice, but involves a question of fraud on a right vested by force of a contract, for a breach of which an action will lie at law; although a court of equity will not enforce a specific performance, for a reason growing out of its peculiar nature, *i. e.*, if the parties are unwilling, they cannot be forced to live together as man and wife should do; so a specific performance is impracticable; and the court declines the jurisdiction, on the same ground that it will not attempt to make parties proceed under a contract to carry on business as co-partners in merchandise, because, without mutual good-will and readiness on both sides, the object cannot be accomplished; still, there is a valid contract, embracing in its consequences the property of each of the parties; for, as is said in *Roper, supra*, 163, the wife's fortune, in addition to his own, may be a weighty consideration and inducement for entering into the contract;" and of course, after the contract to marry is concluded, she cannot convey her property without his concurrence, and if she does, the person taking it with notice will be converted into a trustee, in order to prevent a fraud on the contract.

In our case, the father of Mrs. Gillespie, at whose instance the conveyance was made, and who was acting as the self-constituted *prochein ami* of her infant son, had notice, and indeed, procured her to make it for the express purpose of defeating the rights of the plaintiff vested by force of the contract to marry.

The ground mainly relied on by Mr. Boyden for the defendant, to wit, that the conveyance was for a valuable consideration, is not tenable, for several reasons. We have seen that it was made with full notice of a pre-existing contract, and with the purpose of defeating it. In respect to the several articles of furniture bought by Mrs. Gillespie, her saying "that she intended to give them to her son" amounts to nothing, and has no legal effect. In respect to the land and slaves, the alleged arrangement, not being in writing, was not valid or obligatory in law or equity, and, at most, the amount of it was that her specific legacy should abate ratably with that of her son, and she was to make good by fair contribution any abatement of

his legacy caused by the sale of a slave given to him instead of one given to her—taking into consideration the fact that the legacy to him was contingent upon the event of his arriving at the age of twenty-one, with a limitation over to her if he died under that age, and the legacy to her was for life, with a limitation over to the son if he arrived at full age. So that this understanding can in no sense be treated as a valuable consideration to support the absolute conveyance, which she was induced to make to her son on the eve of her expected marriage, and it must be treated as mere security for any balance which, upon a final settlement of the estate, may appear to be due by reason of a necessity for an abatement of the specific legacies, taking into consideration the value of the legacy to her and the legacy to her son under the will of the testator.

There is still another view on which the ground taken by Mr. Boyden is not tenable. We are satisfied by the evidence that Mrs. Gillespie did not execute the conveyance voluntarily and of her own accord. She did so under moral if not physical duress, and consequently the conveyance is inoperative and of no effect. The testimony of the subscribing witness establishes the actual constraint, and if it be said he is a man of notoriously bad character, the reply is, that "he was selected by the father;" so he cannot object on account of bad character; for, if so, there is no proof of the execution of the deed, and there is room for the imputation that such a witness was selected because the father did not choose to have a credible witness who could speak of the constraint and duress imposed on his daughter. If to this be added the fact that the conveyance was executed at the instance of a father by a daughter whose business he had charge of, who was living in his family, and wholly dependent on him, and who, having agreed to marry a man to whom her father had objections, was willing in almost any way to propitiate his favor, and the further fact that after all these concessions made by her, and the deeds were signed according to his dictation, she is, on the next day, but two days before the day fixed on for her marriage, constrained by her father to start on a journey to Virginia, which purpose she defeated, at the house of a relation, by indisposition, either actual or feigned, whereby her intended husband is enabled to overtake them, clearly makes out a case of duress.

The plaintiff is entitled to a decree setting aside the conveyances as in fraud of his contract to marry, except so far as

to give them effect as a security for any abatement which, in a settlement of the estate, it may appear her legacy was liable to, in order to meet her ratable part of the debts of the testator, which, although not relied on in the bill as a distinct ground for relief, is relevant, in reply to the allegation that the conveyance was for valuable consideration.

Decree accordingly.

GIFT MADE BY WOMAN TO HER CHILDREN on the eve of her second marriage is no fraud on the marital rights of her second husband when he knew of the gift before the marriage: *McClure v. Miller*, 21 Am. Dec. 522.

PARKER v. JONES.

[5 JONES'S EQUITY, 274.]

EQUITY HAS NO JURISDICTION to prevent a second satisfaction of a judgment upon the same execution.

UPON WRIT OF AUDITA QUERELA, the court issuing an execution will call it in when it has been satisfied, and order the satisfaction entered of record.

LEVYING EXECUTION UPON PROPERTY, AND RETURNING IT TO DEBTOR upon his executing a forthcoming bond, is not a satisfaction of such execution.

BILL in equity. Judgment was rendered against J. A. McMannen, as principal, and C. T. McMannen and plaintiffs Parker and Lockhart, as sureties, for one thousand dollars, and in favor of the administrators of R. L. Durham. Execution was issued thereon, and put in the hands of defendant, as sheriff. He levied on all the land owned by J. A. McMannen. The sheriff also had other executions of prior teste in his hands at the same time against J. A. McMannen, and levied them upon personal property of said J. A. McMannen, sufficient, as plaintiffs allege, to have satisfied them. This property went back into the debtor's hands upon his giving a bond for its delivery on the day of sale. Shortly after this, the property was levied on by a constable, under judgments of justices' courts, and executions issued thereon, put in his hands, and the whole of it was sold and applied to the payment of these judgments of the justices' courts. The sheriff then levied the executions of older teste upon the land upon which the Durham execution had been levied, to the exclusion of the latter execution. The bill is filed by Parker and Lockhart against the sheriff and the administrators of the

principal debtor, alleging a combination between said sheriff and the principal debtor and the plaintiff in the justices' judgments to wrest the personal property from the satisfaction of the executions of prior teste above named, and turning them upon the real property, to which alone plaintiffs could look for the satisfaction of the judgment against them as sureties; that said J. A. McMannen is wholly insolvent; that the executions of prior teste aforesaid were satisfied by the levy made upon said personal property; that the levy upon the real property satisfied the execution upon which plaintiffs are liable; that said executions ought not to be satisfied a second time. The prayer is for an injunction to prevent said sheriff from proceeding further. A motion was made to dissolve the injunction, which was refused. Defendants appealed.

Graham, for the plaintiffs.

Phillips and Norwood, for the defendants.

By Court, PEARSON, C. J. The bill discloses no equity against the defendants Staggs and Davis, the administrators of the creditor. He did no wrong, and it is not charged that he in any way induced or concurred in the supposed misconduct of the defendant Jones, as sheriff, or was connected with the supposed fraudulent combination between Jones and the other defendants. On the contrary, he was the party directly injured by it, and was thereby delayed in the collection of his debt, and it would be strange if that could be made a ground for enjoining his personal representative from proceeding in the exercise of their legal right to make the money due upon the judgment.

The position assumed is, that by reason of the "actings and doings" of Jones, the sheriff, the judgment in question was, in legal contemplation, satisfied. Admit, for the sake of argument, that to be true, the plaintiff has a clear legal remedy, for, upon a writ of *audita querela*, the court, where the judgment remains, will order "satisfaction" to be entered up on the record, and call in the execution, if one has issued. So there is no equity involved, and nothing to require the interference of this court.

But waiving that question, do the matters of fact alleged have the legal effect of a satisfaction? The sheriff, having in his hands prior executions in favor of other creditors, had levied them on personal property of the principal debtor, of

value sufficient for their discharge, and permitted the debtor to take the property back into his possession upon his giving a forthcoming bond, and the property is levied upon and sold under executions in the hands of a constable. The execution issuing on the judgment in question, together with the prior executions, are levied on land of the debtor, which is sold by the sheriff, and nearly all the money raised by the sale is applied by the sheriff to the satisfaction of the prior executions, and but a small amount is applied to the execution on the judgment in question.

If the sheriff had enforced the forthcoming bond, and by means thereof made the money to satisfy the prior executions, then he could have satisfied the judgment in question out of the money raised by the sale of the land, but for some cause, with which the creditor has no connection, he failed to do so, and thereby but a small sum was applicable to the judgment, and of course it remains unsatisfied.

If a sheriff levies upon personal property, the title is thereby vested in him, and the execution is satisfied, unless the property gets back into the possession of the debtor, or is otherwise applied to his use: *Collier v. Bank of Newbern*, 2 Dev. Eq. 525. In this case the property did get back into the possession of the debtor, and was applied to his own use in the discharge of the executions in the hands of the constable, and besides, the execution on the judgment in question never was levied on the personal property; so, the *gravamen* of the plaintiff is, that the sheriff did not enforce the forthcoming bond, and thereby make room for the payment of the judgment out of the money raised by the sale of the land. In this complaint against the sheriff, the creditor concurs with them, being himself the party directly injured. How, then, can this omission, malfeasance, or misconduct of the sheriff, give them an equity against his administrators.

Without reference to the answer of the defendant Jones, or the explanation given by him, we are of opinion that the injunction ought to have been dissolved, on the motion of the administrators, for the want of equity against them, and the order continuing the injunction until the hearing must be reversed, and the injunction be dissolved.

Whether the plaintiffs can have any relief against the sheriff, or whether by arranging the debt and taking an assignment from the administrators they can subject him at law, or can work out an equity through the creditors in the prior execu-

tion, so as to have relief on the forthcoming bond, are questions into which we will not enter.

Decretal order reversed.

EQUITY WILL NOT INTERFERE where there is a complete remedy at law: *Partin v. Loutterloh*, 6 Jones Eq. 341, citing the principal case.

LEVY UPON PERSONAL PROPERTY IS SATISFACTION of the execution unless the property gets back into the possession of the debtor: *Hamilton v. Mooney*, 84 N. C. 14, citing the principal case. The same rule applies to levy upon real property: *Townsend v. Smith*, 70 Am. Dec. 400, and note 401; or unless it has gone in payment of higher demands against defendant: *Johnson v. Graham*, 65 Id. 501. A levy on personal property, which is not sold by reason of wrongful act of debtor, will not bar issuance of second writ: *Webb v. Buzzpass*, 33 Id. 310.

OVERTON v. SAWYER.

[7 JONES'S LAW, 6.]

BOND OR SEALED NOTE DELIVERED AS GIFT CAUSA MORTIS will not be transferred to donee so as to vest title in him, unless it is properly transferred by indorsement also, and where the gift was made simply by a transfer of possession, its value may be recovered at law in an action of trover by the personal representatives of the donor.

PLAINTIFF'S testator, in his last illness, placed a bond or note under seal in defendant's hand, requesting that in case he died it be equally divided between one Sawyer and one Eason. It was not indorsed. Plaintiff demanded the paper, and defendant refused to give it up to him. He then brought this suit. Judgment for plaintiff. Defendant appealed.

W. A. Moore and Johnson, for the plaintiff.

Jordan and Winston, jun., for the defendant.

By Court, BATTLE, J. We are unable to distinguish this case, in principle, from those of *Fairly v. McLean*, 11 Ired. L. 158, and *Brickhouse v. Brickhouse*, Id. 404. The principle is, that if negotiable securities be given, either absolutely or upon condition, by the person to whom they are payable to another, without indorsement, the executor or administrator of the donor may recover their value in an action of trover at law. The only ground of distinction between those cases and the present which has been or can be suggested is, that the latter is the case of a *donatio causa mortis*, in which it is insisted that the law transfers the legal title to the donee immediately upon the death of the donor. Why should that make a difference? A *donatio causa mortis* is not a legacy which requires the assent

of the executor to vest the legal title in the donee, but it is a gift made in contemplation of death, which, upon delivery, passes the legal title at once to the donee, upon condition to be void if the donor do not die. If the attempted donation be of something which cannot pass at law by delivery merely, it follows that the legal title still remains in the donor, and upon his death must devolve upon his personal representative.

Hence, we find it expressly stated that bills of exchange and promissory notes, not payable to bearer, are incapable of being the subjects of a *donatio causa mortis*: See 1 Williams on Executors, 504, and the cases there cited. The note, in the present case, it is true, is under seal, but it is an instrument which, by our statute law, is made negotiable by indorsement, like bills of exchange, and must, in this respect, be governed by the same rules. This conclusion is not at all opposed by the decision of Lord Hardwicke, in *Snellgrove v. Baily*, 3 Atk. 214, that a bond for the payment of money may be the subject of a *donatio causa mortis*. That was a case in chancery, and it was held that the equitable interest in the bond passed to the donee, which does not militate at all with the position that the personal representative of the donor could, at law, recover the value of the bond in an action of trover.

Judgment affirmed.

THE PRINCIPAL CASE IS IN CONFLICT with the authorities. A note payable to order may be subject to a gift *causa mortis*, without indorsement, though the statute declares that an instrument payable to order is payable to the written order of the payee: *Druke v. Heiken*, 61 Cal. 346; see also *Grover v. Grover*, 35 Am. Dec. 319; *Borneman v. Sidlinger*, 33 Id. 628.

FESSENDEN v. JONES.

[7 JONES'S LAW, 14.]

GUARDIAN WHO CALLS PHYSICIAN to attend professionally upon a slave of his ward is personally liable to him for the bill, although the physician knew when he performed the services that the slave was the property of the ward.

THIRD PARTIES MUST CONTRACT WITH GUARDIAN, and not with the ward; they cannot even contract with the latter for necessities, except in isolated cases.

ASSUMPSIT. Plaintiff was a physician. He declared for medical services rendered to a slave of defendant's ward at the request of defendant. He knew the slave was the ward's

property. Judgment for plaintiff against defendant personally. Defendant appeals.

II. A. Gilliam, for the plaintiff.

Winston, jun., for the defendant.

By Court, MANLY, J. The single question presented in this case is, whether a guardian, who calls in a physician to the slave of his ward, can be rightfully charged with and made responsible for the medicines and services rendered.

The court is clearly of opinion he may be. The credit in such case is, not only in point of fact given to the guardian, but ought to have been so given. The guardian is charged with the duty of controlling and managing the person and property of the ward, and judging of the expenditures which may be needful for either, and he alone is informed of the condition of the ward's resources. Hence the contract should be made with the guardian, and hence the guardian ought to be looked to for payment. To allow a departure from the above rule would, in the first place, have the effect to encourage in the youth of the country appeals from the judgments of their guardians, and in the next, make the right to compensation on the part of the creditor depend upon a condition of things of which he had no means to judge, and therefore uncertain and precarious.

The foregoing principles are sustained, it is believed, by the cases of *State v. Cook*, 12 Ired. L. 67; *Hussey v. Roundtree*, Busb. L. 110; and *Freeman v. Bridger*, 4 Jones L. 1.

In the latter case, it is said that this rule has been established by previous adjudications of the court: "Where there is a guardian, the replication for necessities does not avoid the plea of infancy, because the fact of there being a guardian, whose duty it is to furnish all necessities for the support of the ward, shows that it was not necessary for the infant to contract."

Where there is a parent or guardian, the infant cannot contract, even for necessities. Persons must take care (save in certain excepted cases) to contract with the guardian, and contracting with him, it seems to be a principle of common justice they should be permitted to resort to him primarily for the fulfillment of the contract. To turn persons, dealing with the guardian in relation to the ward's estate, over to the ward, would render it necessary, in every case, for such persons, in order to guard themselves against loss, to enter into an ac-

count with the guardian as to the amount of the ward's estate—the income and expenditures, and the necessity for the expenditure then contemplated. Such requirements, applied to the ordinary transactions of life, and especially to such a one as is the subject of this suit, are manifestly absurd.

It will be seen, from the foregoing considerations, a guardian is not in the condition of an ordinary agent or factor, and therefore the same legal relations, in all respects, do not subsist between them and those whom they respectively represent. The former represents one who has no legal capacity to contract for himself; the latter, one who is fully able to contract and bind were he present. The former is substituted by the law, and stands *in loco parentis*. The latter is the appointee of his principal, and that principal can, at any moment, abrogate or modify his powers.

This want of analogies between the two, in the sources and limits of their powers, makes it obvious there can be no complete analogy between them as to liabilities or exemptions.

There is no error in the judgment of the court below.

Judgment affirmed.

THE PRINCIPAL CASE WAS DISTINGUISHED from the case of *Parker v. Davis*, 8 Jones L. 462, in the decision of the latter case. In that case, the defendant was a person who had a guardian appointed under an inquisition of lunacy, and in making the distinction the court say: "The analogy will not hold in cases like the present, because infants must necessarily remain such until they arrive at full age, when the guardianship of them terminates; but a lunatic may become of sound mind, and be capable of contracting for himself, and yet the guardianship may continue until another inquisition is found, by which he is declared to be of sound mind again."

PERSONAL LIABILITY OF GUARDIANS.—The examination of this subject involves an inquiry into one of the most delicate and important artificial relations known to civilized life—that of guardian and ward—a relation by which the former assumes, and is bound to perform, many arduous duties, frequently without compensation. It is, however, only with the pecuniary relations between the guardian and his ward, and between the former and third persons with whom he transacts business relating to the ward and his property, that we are here concerned. The law upon this subject is well settled, and manifests great practical knowledge of human nature, and a paternal solicitude for the welfare of the ward. In many instances the rules of the common law have been modified by enactments of the various states of the Union, but in general, these simply declare the equitable and just rules that have for ages past been laid down by the courts, so that they are yet the recognized rules of action by which the guardian must be guided in transacting the business of his ward. In the performance of his duties, disinterested fidelity and ordinary diligence are required of him. He must act for his ward, and not for himself: *White v. Parker*, 8 Barb. 52; *Green v. Winter*, 1 Johns. Ch. 27; *Parkist v. Alexander*, Id. 304; *Schirffelin v. Stewart*, Id. 620; *Brown v. Ricketts*, 4 Id. 303.

2 Kent's Com. 229. His trust is one of obligation and duty, not one of speculation or profit to himself. He cannot reap any benefit from the use of the ward's money, nor can he act for his own benefit in any contract, purchase, or sale in relation to the subject of his trust: 2 Kent's Com. 229; *Dietterich v. Heft*, 5 Pa. St. 87; *Clowes v. Antwerp*, 4 Barb. 416; *Lefevre v. Larocay*, 22 Id. 468; *Kennard v. Adams*, 11 B. Mon. 102; *Sparhawk v. Allen*, 21 N. H. 9; *Draper v. Joiner*, 49 Am. Dec. 719; *Dooms v. Richards*, 4 Del. Ch. 416; *Offes v. Greenfield*, 62 Cal. 602. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage accrues entirely to the infant: 2 Kent's Com. 229. He is not required to exercise the extraordinary enterprise, perseverance, and speculating sagacity and ingenuity which give some men peculiar facility for the acquisition of property. He is only bound to fidelity, ordinary diligence, and prudence. To hold him to a more strict responsibility would prevent men from assuming duties which are as necessary in society as they are profitless, and sometimes thankless, to those who perform them: *White v. Parker*, 8 Barb. 53; *Jones's Appeal*, 42 Am. Dec. 282; *Atkinson v. Whitehead*, 66 N. C. 236.

He must furnish his ward with necessaries, but he must not exceed his ward's income: *Johnston v. Coleman*, 3 Jones Eq. 290; *Hinton v. Hinton*, 68 N. C. 99; *Britt v. Cook*, 12 Ired. L. 67; *Hussey v. Roundtree*, Busb. L. 110; *Hyma v. Cain*, 3 Jones L. 111; *Freeman v. Bridger*, 4 Id. 1; *Hudson v. Lutz*, 5 Id. 217. Hence he is not bound to reimburse third parties who furnish necessities to the ward: *Overton v. Beavers*, 70 Am. Dec. 610, and note 616; *Patton v. Thompson*, 67 Id. 222, and note 224. The ward's personal property, and the rents and profits of his realty, are the pecuniary subjects of his trust. It is his duty to get and keep possession of these, and he must use all reasonable means to do so: *White v. Parker*, *supra*; 2 Kent's Com. 229; *Micon v. Lamar*, 7 Fed. Rep. 180; *Taylor v. Bemis*, 110 U. S. 42; *Shurtleff v. Rile*, 4 N. E. Rep. 407.

If he has been guilty of any negligence in keeping, caring for, or disposing of the ward's property, money, etc., whereby the estate has incurred loss, he will be obliged to sustain that loss: 2 Kent's Com. 230. This subject has been discussed in 2 Kent's Commentaries, *ante* (11th ed.), and notes *a* and *b*, and cases there cited, and the principles herein stated laid down. The guardian is a trustee, and is governed by the same rules as are other trustees; trustees have been held liable for paying out money on the evidence of a certificate of marriage, where it afterwards proved to be a forged certificate: *Eaves v. Hickson*, 30 Beav. 136; *McLean v. Hossa*, 48 Am. Dec. 94; *Draper v. Joiner*, 49 Id. 719; *Knowlton v. Bradley*, 43 Id. 609; *Stem's Appeal*, 34 Id. 569; *Past's Estate*, Myrick's Prob. Rep. 230; *Stothoff v. Reed*, 32 N. J. Eq. 213; *Shurtleff v. Rile*, 4 N. E. Rep. 407. If a guardian accepts an unsecured note in payment of a debt due his ward, he is guilty of laches, and is liable to the latter for the amount of such note: *Covington v. Leake*, 65 N. C. 594; *Stothoff v. Reed*, 32 N. J. Eq. 213; *May v. Duke*, 61 Ala. 53. It is not negligence in the guardian in relation to investing his ward's funds if he retains on hand enough to meet contingent expenses only: *Knowlton v. Bradley*, *supra*; nor is he bound to sue immediately upon an unsecured liability, which has come to his hands as a part of his ward's estate: *Stem's Appeal*, *supra*. A loan by a guardian of ward's money, which is secured by pledge of stock, in a corporation, at three fourths its par value and less than three fourths of its market value, was held to be an investment justified by sound discretion, and the guardian was held not to be responsible for a loss resulting from a subsequent depreciation in the value of the stock: *Lowell v. Minor*, 32 Am. Dec. 206.

The same principle is recognised in *Re Worrell's Estate*, 14 Phila. 311; *Green v. Rountree*, 88 N. C. 64; *Robertson v. Wall*, 85 Id. 283; *Haddock v. Planters' Bank*, 66 Ga. 496; *Walkhall v. Walkhall*, 42 Ala. 450; *Hoffman v. Stouckemire*, Id. 593; *Elston v. Wyley*, Id. 640; *Covington v. Leake*, 65 N. C. 594; *Love v. Logan*, 69 Id. 70; *Coffin v. Brumlett*, 42 Miss. 194.

It has been held that a ward has a right to recover his estate from his guardian, notwithstanding the latter during the rebellion, when Confederate securities were approved in the community where he resided, invested in good faith, and pursuant to a law of the state, the assets of his ward in these securities, and the value was lost by their subsequent depreciation: *Powell v. Boone*, 43 Ala. 459; *Hall v. Hall*, Id. 488; *White v. Nesbitt*, 21 La. Ann. 600; *Houston v. Deloach*, 43 Ala. 364; *Powell v. Knighton*, Id. 626. But the same court held in *Houston v. Deloach*, *supra*, that the extent of the liability of guardians for property of ward, which they converted into Confederate currency or bonds, depended upon the merits of each case in view of all the circumstances affecting it. If he deposits money of his ward in his own name in a bank, or takes a note for money due his ward payable to himself, he thereby converts the money, and if it is lost he must pay it himself: *Jenkins v. Walter*, 29 Am. Dec. 539; *White v. Parker*, 8 Barb. 53; *Draper v. Joiner*, 40 Am. Dec. 719; *Knowlton v. Bradley*, 43 Id. 609; *Stanley's Appeal*, 49 Id. 530. A contrary decision was made in the case of *Parsley v. Martin*, 77 Va. 376; S. C., 46 Am. Rep. 733. If he puts the ward's money in trade, the ward, upon coming of age, may elect to take the profits of the trade. If the guardian refuses to disclose these profits, he will then be chargeable with compound interest: 2 Kent's Com. 229; *Say v. Barnes*, 8 Am. Dec. 679; *Fridge v. State*, 20 Id. 463. If he neglects to keep his ward's money at interest, or mingles it with his own, the court will charge him with simple interest, and in cases of gross neglect, with compound interest: 2 Kent's Com. 229, 231; *Say v. Barnes*, *supra*; *Fridge v. State*, *supra*; *Burke v. Turner*, 85 N. C. 500; *Houston v. Deloach*, 43 Ala. 364; *Owens v. Peebles*, 49 Id. 338; *Shuford v. Ramsour*, 63 N. C. 622.

He may excuse himself for not loaning out his ward's money by showing that it could not safely be done: *Brand v. Abbott*, 42 Ala. 499; *State ex rel. Whitford v. Foy*, 65 N. C. 265; *Ashley v. Martin*, 50 Ala. 537.

It has been held that a guardian is guilty of laches if, when there is no need of it, he collects a well-secured *ante-bellum* note, in Confederate currency, and immediately reinvests it in Confederate bonds, and is liable to his ward for the full amount of the principal and interest of said note: *State ex rel. Purser v. Simpson*, 65 N. C. 497.

He is not responsible for a loss to his ward attributable to his not having resorted to new and extraordinary remedies, the force and effect of which are doubtful: *State ex rel. White v. Robinson*, 64 N. C. 698; *Sudderth v. McComb*, 65 Id. 186; *Whitford v. Foy*, Id. 265.

If he loans out his ward's money and loses it, for want of security or on account of gross negligence of any kind, he must be charged with the loss: *Konigmacher v. Kimmel*, 21 Am. Dec. 378.

There are exceptions to this rule. Where the persons with whom he deals are amply solvent (Id.), the only safe plan is for the guardian to take security in every instance. Where a guardian invested the money of his ward in the promissory note of a person in good credit, and took what was regarded at the time as reasonable security for its payment, it was held that he acted in good faith and with sound discretion, and although the maker of the note failed, and the security became inadequate to its payment, yet the guardian was not

responsible for the loss: *Lovell v. Minot*, 20 Pick. 116; *Hart v. Ten Eyck*, 1 Johns. Ch. 76.

As above stated, the principles that govern other trustees govern guardians. These principles are well established in the English equity system, and in general pervade the jurisprudence of the United States: *Green v. Winter*, 1 Johns. Ch. 26; *Duncomb v. Duncomb*, Id. 606; *Schieffelin v. Stewart*, Id. 620; *Holridge v. Gillespie*, 2 Id. 30; *Davoue v. Fanning*, Id. 252; *Smith v. Smith*, 4 Id. 281; *Evertson v. Tappen*, 5 Id. 497; *Clarkson v. De Payster*, Hopk. 424; *Rogers v. Rogers*, Id. 515; *Reeves's Domestic Relations*, 325, 326; *Fox v. Witcocks*, 1 Binn. 194; *Butler v. Haskell*, 4 Desau. 702-705; *Ringold v. Ringold*, 1 Har. & G. 11; *Edmonds v. Crenshaw*, State Eq. Rep. (S. C.) 224; *Turney v. Williams*, 7 Yerg. 172; *Karr v. Karr*, 6 Dana, 3; *Kyle v. Barnett*, 17 Ala. 306; *Kerr v. Laird*, 27 Miss. 544; *Light's Appeal*, 24 Pa. St. 180; *Warrell's Appeal*, 23 Id. 44. He has no power to sell his ward's real property at all; but if a proper case exists to sell the same, he must apply to a court having jurisdiction of the subject, for authority to sell: *Warrell's Appeal*, *supra*; S. C., 6 Pa. St. 508; *Stanley's Appeal*, 8 Id. 431. This power of the court is derived entirely by statute: *Taylor v. Phillips*, 2 Ves. sen. 23; *Rogers v. Dill*, 6 Hill, 415; *Cooter v. Dearborn*, 4 N. E. Rep. 388.

In general, under the statutes of the various states composing the United States, a guardian cannot sell the property of his ward, either real or personal, until duly authorized by a court of competent jurisdiction, upon proper petition and proofs. The common law is changed concerning his right to sell the personality of the ward: *Moore v. Hood*, 70 Am. Dec. 210.

The doctrine of the principal case concerning the liability of the guardian personally, to third persons for contracts made by him for his ward's benefit, is fully sustained by the authorities.

The guardian is personally bound to third persons for all contracts he makes on behalf of his ward, for he alone has a knowledge of the solvency of his ward's estate. It would give him an unfair advantage over them to permit him to contract with them, and after they had performed their part of it in good faith, to permit him to refer them for payment to the assets of his ward, which might be totally insufficient for that purpose. To hold him personally liable, therefore, has the effect to make him have a care that he does not exceed the assets of the estate; and it is a wise and salutary rule. This doctrine is held in the following cases: *Pollard v. Pollard*, 83 N. C. 96, citing the principal case; *Thatcher v. Dinmore*, 4 Am. Dec. 61; *Forster v. Fuller*, Id. 87; *Massachusetts General Hospital v. Fairbanks*, 132 Mass. 414; *Rollins v. Marsh*, 129 Id. 116; *Poole v. Wilkinson*, 42 Ga. 539; *Salem Female Academy v. Phillips*, 68 N. C. 491.

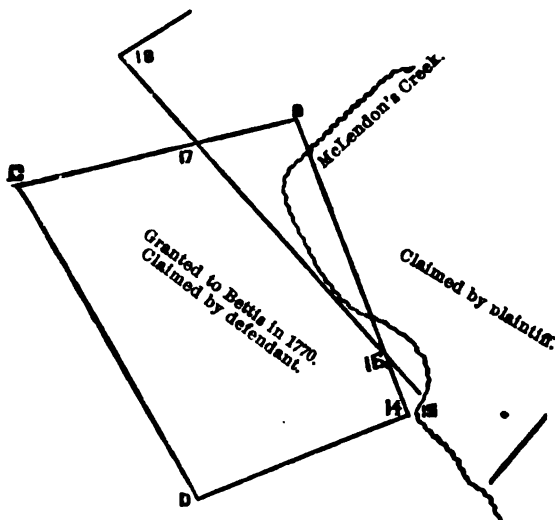
DOE EX DEM. CLEGG v. FIELDS.

[7 JONES'S LAW, 37.]

SURVEYOR'S OPINION AS THAT OF MAN OF SKILL AND SCIENCE may be admitted in evidence for the purpose of showing that marks on a tree, claimed as a corner, were corner or line marks, but not to show that this was the corner or line between adjoining tracts of land.

IF OUTSTANDING TITLE IS SHOWN OUT OF PLAINTIFF in ejectment, he cannot recover.

EJECTMENT. Plaintiff made out a case which would entitle him to recover according to his lines (16 to 18), as laid down in the annexed diagram. But defendant claimed under a grant to one Bettis the land comprised in the quadrangle 14, B, C, D, dated in 1770. Plaintiff's claim only dated back to 1803. The *locus in quo* is the land within the triangle 17, B 16, which is common to both claims. Neither party ever took actual possession of this triangular tract until 1856, when defendant cleared a field on it.



A surveyor, introduced by defendant, was allowed to testify to the character, as line or corner marks, of certain marks found by him upon and near a tree claimed by defendant to be a corner of his claim. Verdict and judgment for defendant. Plaintiff appealed.

Person, for the plaintiff.

Kelly, for the defendant.

By Court, MANLY, J. The record of the trial below does not disclose any error of which the plaintiff can justly complain. The opinion which the surveyor was allowed to express as to the location of the Bettis grant would be erroneous if the jury had not been guarded from considering it for any improper purpose.

The court informed the jury that "the surveyor's opinion, as that of a man of skill and science, was admitted for the pur-

pose of showing that the marks upon the tree, claimed as a corner, were corner or line marks, but not admitted to show, as a question of science, that this was the corner or those the lines of the Bettis grant. The court informed the jury that they must determine for themselves whether this tree, claimed as a corner, and the two lines from 14 to B and from B to C, were in fact the corner and the lines of the Bettis grant; and whether the defendant had satisfied their minds that this grant was so located as to include the trespass." Subject to to this modification, the opinion was left to the jury to be considered and weighed by them as other evidence, and for the purpose thus explained, we think it was legitimate. The matter embraced in this exception has been so recently discussed and explained in this court in the case of *Stevens v. West*, 6 Jones L. 49, that we deem it unnecessary to say more. It will be found by a reference to that case that the judicial officer who tried this below was careful to keep strictly within the limits there assigned to the opinions of a surveyor as an expert. That case, being entirely approved, covers the whole ground of the first exception.

With respect to the other, in reference to the instructions asked for and refused, it is obvious the court below was correct. It will be observed that if the Bettis grant were located so as to cover the land in dispute there would be in those who claimed under him an older, and therefore a superior, outstanding title, and the plaintiff could not recover, upon a plain principle governing this form of action. The jury had already been told that the plaintiff had made out a *prima facie* case, and was entitled to recover, unless the grant to Bettis was located as the defendant contended. It was, therefore, not material whether the defendant had shown title in himself. Upon the hypothesis submitted, he had shown it out of the plaintiff, and that was sufficient to defeat the action. The plaintiff had already had the benefit of all proper instructions in his behalf, and the additional instructions asked for were without point, and properly refused.

There is no error, and the judgment must be affirmed.

Judgment affirmed.

PERSONS OF SKILL MAY GIVE THEIR OPINIONS in evidence when, from the nature of the case, facts disconnected from such opinions cannot be given to the jury to enable them to pass upon the question with the requisite knowledge and judgment: *Jefferson Ins. Co. v. Cothrel*, 22 Am. Dec. 567

SURVEYOR DOES NOT TESTIFY AS EXPERT, but merely as a witness to facts within his knowledge, and his testimony is to be received only so far as his personal knowledge extends, to identify marks made by another surveyor: *Barron v. Cobleigh*, 35 Am. Dec. 505.

SMITHWICK v. WARD.

[7 JONES'S LAW, 64.]

"VINDICTIVE DAMAGES" is synonymous with "vindictory" or "punitory damages." They are allowed for punishment to defendant for violating the law, and to deter from similar violations.

IN MITIGATION OF PUNITORY DAMAGES, it may be shown that defendant has been convicted and punished for the same offense in a criminal action.

THAT PLAINTIFF IS TURBULENT, OR DEFENDANT QUIET IN DISPOSITION, is not competent evidence in an action for damages for an assault and battery.

JOINT VERDICT AGAINST ALL is proper, in an action for damages for an assault and battery, when it appears that it was a joint act of all, either by counseling it before its commission, or by being present when the trespass was committed, and aiding, abetting, and encouraging, or by committing the trespass itself.

RELEASE NOT UNDER SEAL will not operate to release the parties defendant in an action for damages caused by an unlawful assault and battery.

RELEASE OBTAINED BY DEFENDANT after action commenced must be specially pleaded in the answer, or in a supplemental answer.

ACTION for damages for an assault and battery. Verdict for plaintiff. Defendants appealed. Four exceptions were taken at the trial: 1. Defendants offered to prove in mitigation of "vindictive damages," that they had been convicted in a criminal action, and punished for the offense for which they are here prosecuted; the court rejected the evidence as irrelevant; 2. That they are quiet men in disposition; that plaintiff is turbulent; 3. Defendants asked the court to charge the jury that they might give damages against each defendant, according to his guilt. The court refused this, but instructed that the jury should bring in a joint verdict if they found against more than one defendant. Defendants offered in evidence a paper without a seal as a release executed by plaintiff to one of the defendants, who was sued and afterwards discharged. The following is a copy of said paper: "I hereby release L. L. Clements from all claim or demand on him in this suit [naming it], and direct a nonsuit as to him." The nonsuit was entered herein in accordance with the stipulation in this document. This instrument was executed and delivered after suit

commenced and answer filed. It was not put in issue in the pleadings. All the exceptions were overruled.

Rodman and Warren, for the plaintiff.

Winston, jun., for the defendants.

By Court, MANLY, J. The exceptions taken on the trial below are stated in the record with distinctness, and we have duly considered them in this court. The only one about which we have had any difficulty is the ruling by the court that the conviction and punishment, criminally, for the offense was irrelevant, and not proper to be considered in abatement of the demand for vindictive damages. The word "vindictive" here adopted is in common professional and legislative use as a synonym of vindictory or punitory, and in that sense we suppose it is used in the record. This element, in the estimate of damages, is allowed, to punish the defendants for violating the laws, and by making them smart, to deter others as well as themselves from similar violations.

The principle upon which society acts in punishing criminally is precisely the same. The public never is actuated by revenge, but solely by a motive of self-protection, and punishes to prevent a repetition of the offense by the culprit, or its perpetration by others.

These considerations suggest the pertinency and propriety of the evidence offered. When the inquiry is made by the jury, in a civil action, how much ought to be given for smart-money, it is material and legitimate to know how much the defendant has been made to smart already, that the jury may estimate how much more will be required to effect the object of the law. When the court is called upon, in the exercise of criminal jurisdiction, to fix a punishment, it is, in like manner, proper for it to know whether there has been a civil action, and what has been the result of it. Neither the court nor the jury will be bound, as we suppose, by the judgment of the other, but each will be at liberty to add to what has been done by the other, such additional penalties as each in its turn may judge adequate and proper: *Gilreath v. Allen*, 10 Ired. 67.

Other elements in the measure of damages should not be affected at all by the amount of criminal punishment, thus actual pecuniary damages—damages for loss of time, for corporeal and mental suffering, for social degradation—ought to be given, irrespective of punishment criminally.

In considering this question, we have felt some doubt whether vindictory damages ought to be given to a party in a civil suit, under any circumstances, where the case appears to involve, indubitably, the same principle and object that a punishment by the public does; and it would seem, therefore, more proper to keep them distinct. But the practice of allowing this element of damages has been so long followed in our circuit courts that we do not think proper to disturb it; and as the admission of the testimony proposed on the trial below will prevent all harsh operation of the rule by obviating the danger of double punishment, we feel less reluctant to give it the sanction of the court. We are of opinion the testimony ought to have been received for the purpose for which it was offered.

Upon the other points made by the exceptions we concur entirely with the court below. In the action for assault and battery, the character of the plaintiff is not in issue. To be beaten does not *per se* operate any loss of character to the injured party. Such loss must result from his own misconduct, and hence, damages are never given to compensate for such loss. A man of aggressive character may be imposed upon by one of an opposite temperament, and therefore every case ought to stand upon its own peculiar facts, and be decided without reference to the antecedents of the parties. Authorities, if needed to support a position of this sort, will be found in *Sedgwick on Damages*, 555; 2 *Greenl. Ev.*, secs. 267, 268; *McKensie v. Allen*, 3 *Strobh.* 546; *Rhodes v. Bunch*, 3 *McCord*, 66.

In the matter of the third exception, our opinion is, the case does not disclose a state of facts upon which the instructions asked for would have been proper. It must have been a peculiar state of facts to warrant such instructions, as in a case of continued trespass, where some are guilty of a part only, and others of another part only: 2 *Tidd's Practice*, 895, 896. But where there is a common intent to assault and beat, or where the parties are all present at the beating, as principals, either in the first or second degree, or are guilty as abettors by reason of counsel, or encouragement given beforehand, each is guilty of the whole, and in such case, joint damages would alone be proper. It does not appear that there was a state of facts to call for the instructions asked, and we suppose none such existed.

The fourth exception is also groundless. The instrument offered is not under seal, and therefore cannot operate as a re-

lease in any case. Moreover, it has not been brought before the court in a way to make it available if it were good; there is no plea under which it could be properly shown. Matter of defense, occurring after issues joined, must be pleaded specially, "since the last continuance," as a bar to the further continuance of the suit. Without a special plea since the last continuance, therefore, such matter of defense could not have been brought before the court.

As these latter points may be raised upon another trial of this case, we have thought it best to express an opinion upon their merits.

The refusal to admit the testimony offered to mitigate punitive damages we think erroneous, and for that reason the judgment below must be reversed, and a *venire de novo* awarded.

Judgment reversed.

EXEMPLARY DAMAGES may be awarded in an action for assault and battery: *Rowe v. Moses*, 67 Am. Dec. 560, and note 562, where the subject of exemplary damages is elaborately discussed and the authorities cited. Pecuniary circumstances of defendant may be taken into consideration: *Id.*

STATE v. TILLETSON.

[7 JONES'S LAW, 114.]

BY JURY FAILS TO AGREE UPON VERDICT, upon a trial of a defendant for larceny, before the term of court expires, and when the term expired, they, without agreeing upon a verdict, dispersed, and defendant was also allowed to go at large, it was held that the prosecuting attorney might, without leave of court, cause a *capias* to issue against him, and cause him to be again put on trial.

MOTION to quash an indictment for larceny. Defendant was indicted and put on trial. The jury failed to agree until the term of court expired. At its expiration the judge of the court announced the fact, and left his seat and went away. The jury left the jury-room and dispersed without agreeing upon or returning a verdict. The defendant was allowed to go free. The prosecuting attorney afterwards caused a *capias* to be issued, upon which defendant was rearrested and again put upon his trial. Defendant filed an affidavit showing the above facts. The court quashed proceedings and discharged defendant. The state appeals.

Jenkins, attorney-general, for the state.

Lanier, for the defendant.

By Court, MANLY, J. The points presented to this court by the appeal of the solicitor for the state are, first, whether, when a jury fails to return a verdict in a case of larceny, in consequence of the expiration of the term, the accused may be put upon his trial again; and if he may, secondly, whether the prosecuting officer can, without special leave of the court, cause a *capias* to be issued.

It seems now to be settled law, that in cases of misdemeanor the court has a discretion to withdraw a juror, and order a *venire de novo*, when it appears necessary to the ends of justice. This was affirmed in the case of *State v. Morrison*, 3 Dev. & B. 115, and also in the case of *State v. Weaver*, 13 Ired. L. 203. This latter case was an indictment for receiving stolen goods, which the statute puts upon the same footing with larceny, in all respects except in classification. It is, therefore, as we conceive, an authority for the exercise of the power by the court in a case of larceny.

The indulgence of such a power in capital felonies underwent much discussion in the cases of *In re Spier*, 1 Dev. 491, and *In re Ephraim*, 2 Dev. & B. 162; and by the court's action in those cases, the power is denied in felonies of that class, except in cases of supreme and inevitable necessity. In the first of these cases, the expiration of the term was held not to be such a case of necessity. These cases may be considered as settling the law in respect to the class of felonies of which they treat, but the restricted range of judicial power, as established in them, has never been applied to offenses of inferior grades, whether felonies or misdemeanors, and we think it is not applicable. The power, nevertheless, is not an arbitrary one, but should be resorted to only where it seems to the court, in the exercise of a sound legal discretion, to be necessary.

We have dwelt more on this power of the court to direct a mistrial, because we consider it settles the point made in the case before us. For if the solicitor may *not. pros.* at will, and issue a *capias* unless restrained, and bring the defendant up for trial again (which is admitted to be legal), and if the court may, in the exercise of its discretion, direct a mistrial and order a *venire de novo*, much more, it seems to us, will a new jury be proper where there has been a mistrial, caused by operation of law, by an event which comes like an interposition of Providence—which neither party has contrived to bring about, and which neither has had the power to hasten or retard.

The objection to the exercise of this power on the part of the

courts is, that it might lead to the willful oppression of the citizen. No such objection can apply when the power is not called into action at the will of the court, but is a pre-existent rule of law, for the intervention of which one party is no more responsible than the other.

The only doubt is, whether it be not such a prevention of trial as would justify a *venire de novo* in any grade of offense; whether it be not one of those inevitable events springing from the short and definite limits of our sessions, which ought to have been classed with such accidents as the death or violent sickness of a judge or juror, the sudden and violent sickness of a witness, and the insanity of the prisoner, all of which present cases for a mistrial and a *venire de novo*, even in capital cases.

If the court would have had the right to anticipate the moment when the term closed and its power ceased, and call in and discharge the jury, and thereupon hold the defendant subject to a future trial, it will follow that he may with equal right be held for trial when there has been a discharge by law—a legal dissolution. The failure of the judge to act has placed the culprit in no worse situation; on the contrary, the course pursued was the most favorable one for the attainment of his rights. He has been allowed every moment of the term to get a verdict in, and of this he cannot justly complain.

The second point of objection made to the proceedings below is as to the power of the solicitor for the state, without special leave, to cause a *capias* to be issued. We are of opinion this power exists. The defendant being subject to be tried again, the process by which alone it could be effected followed in the ordinary course of proceeding. There was no legal discretion in the judge to refuse it, and therefore leave was not necessary to give it validity.

Authority for this will be found in the case of *State v. Thompson*, 3 Hawks, 613.

The judgment of the court below, quashing the *capias* and proceedings, is reversed, and the solicitor for the state is allowed to put defendant upon his trial again.

Judgment reversed.

THE PRINCIPAL CASE WAS APPROVED AND CITED ON the question of mistrial, in *State v. Bass*, 82 N. C. 574; also in *State v. Paylor*, 89 Id. 543.

JEOPARDY, WHAT IS: See *Price v. State*, 72 Am. Dec. 199, where the question is discussed, as also is the question of the right to discharge a jury, in a criminal case, without the defendant's consent. The latter question is discussed in a note to the above case, Id. 201, where authorities are collected.

STATE EX REL. JENKINS v. TROUTMAN.

[7 JONES' LAW, 189.]

NEGLECT IN SERVING CAPIAS is committed by a sheriff when the person to be arrested is on a temporary visit in the state, and resides out of the state, and the officer has information of that fact, and also that the party will be at a certain place on a certain day, and the officer fails to be there to arrest him, and gives no excuse why he was not there, and the party succeeds in leaving the state without being arrested, by reason of the said failure of the officer.

WHEN OFFICER IS GUILTY OF NEGLIGENCE IN NOT SERVING WRIT, ONUS IS ON HIM to show that the defendant was insolvent, and that plaintiff was not damaged by his neglect.

EVIDENCE THAT DEFENDANT AGAINST WHOM WRIT IS DIRECTED WAS INDEBTED TO OTHERS THAN PLAINTIFF is not material upon a question of his insolvency, and should not be allowed.

ACTION on sheriff's bond. The breach assigned was failure of sheriff to arrest one Houston on a *capias ad respondendum*. Said Houston was indebted to plaintiff in the sum of six hundred and ninety dollars and eighty-four cents, which is still unpaid. September 4, 1855, the writ was placed in said sheriff's hands against said Houston, who resided in California, and one Randolph, a resident of this state. The latter was, and for a long time had been, insolvent; no part of debt could be collected out of him. Houston was on a visit to friends in this state. The sheriff knew all this, and had information that Houston would be at the house of his (Houston's) brother-in-law on a certain day. The sheriff failed to be there at that time, but had information that he and his mother had passed a short time before he received this last information, on his way out of the state, which he left without being arrested. Defendant offered to prove that said Houston was indebted to various persons in this state in large sums. Plaintiff objected; objection sustained. The other facts and instructions of the court are stated sufficiently in the opinion.

Fleming, for the plaintiff

Fowle, Osborne, and Sharpe, for the defendants.

By Court, **BATTLE, J.** The testimony in this case is not materially variant from that given on the trial of the case of *Murphy v. Troutman*, 5 Jones L. 379. The principal defendant, Henry Troutman, was unquestionably guilty of negligence in not executing the writ of *capias ad respondendum*, which, as the sheriff of the county of Iredell, he had in his hands against J. W. Houston. So far from making a diligent

effort to arrest the debtor, as the exigency of the writ demanded, and as his duty required, he seems rather to have avoided a meeting with him, and to have contented himself with making a few inquiries about him, and at last, an exceedingly slow pursuit after him. The presiding judge was, therefore, fully justified in his instruction to the jury that the defendant was guilty of neglect in failing to make an arrest. The charge of his honor was, in our opinion, equally correct on the question of damages. "As the plaintiff had put the defendant in the wrong, he was liable for such damages as had been sustained thereby, which *prima facie* was the amount of the debt that was lost, and it was for the defendant to mitigate the damages by proving that the effect of his wrongful act was not so great, because the debtor, who had been suffered to leave the state, had not the ability to pay the debt, and his arrest would not have enabled the plaintiff to realize the amount, or any part thereof; or if a part only could have been thereby realized, then to limit his liability to that amount." This was the doctrine held in the case of *Murphy v. Troutman*, 5 Jones L. 379, above referred to, and although the English cases on the subject seem to be in a state of perplexing uncertainty, the current of decisions in the different states of the Union supports the conclusion at which we have arrived: See Sedgwick on Damages, 510 et seq.; and 2 Hilliard on Torts, 340 et seq. The testimony offered by the defendants to show that J. W. Houston was largely indebted, by notes and bonds, to different persons in the counties of Iredell and Rowan, was properly rejected, because it was immaterial and irrelevant. The object of the testimony was, we are told, to lessen the amount of damages to which the plaintiff would have been otherwise entitled, because, it is argued, that the debtor would, if he had been arrested, probably have assigned his property to secure the payment of those debts, and would thereby have diminished the plaintiffs' chance to get theirs. This argument is fully answered by what was said by the court in the somewhat similar case of *Sherrill v. Shuford*, 10 Ired. L. 200. "If it can shield the sheriff, in this case, from answering in substantial damages, it will answer in any other where the defendant may owe more than he can pay. In all such cases, the officer may keep the writ in his pocket, and when sued, turn upon the plaintiff and say, 'You have suffered no injury; if I had executed the writ and taken bail, the defendant might have paid away all his property in dis-

charge of other debts, and you would have got nothing.' This cannot be law. The true inquiry is, Has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might, by due process, have been subjected to it, he shall answer to the full amount of the debt."

Judgment affirmed.

DARDEN v. COWPER.

[7 JONES'S LAW, 218.]

ACTION ON CASE IN NATURE OF WASTE will not lie against a tenant in common in favor of another.

ACTION on case in nature of waste, brought by one tenant in common against another. Defendant's testator was in sole possession of the lands held in common, being a tract of about five hundred acres, four hundred of which were valuable for tillage; the balance is of little or no value. Defendant's testator cleared off the whole of the four hundred acres, and did not leave on the land timber enough to repair the fences, or for other necessary purposes. He declared his purpose to be to wear out the ground. It was shown that he had permanently injured the land and depreciated its value. Judgment for plaintiff. Defendant appealed.

Barnes, for the plaintiff.

Winston, jun., for the defendant.

By Court, PEARSON, C. J. We do not concur in the opinion of his honor, that the evidence established such an injury to the land, and wrong on the part of the defendant, as will enable a tenant in common to maintain an action on the case, in the nature of waste against his co-tenant.

There is a marked distinction in respect of what constitutes waste, in the relation of a remainderman or reversioner, after an estate for life or years, and the particular tenant, and the relation of tenants in common who have each an estate of inheritance in possession.

If a tenant in common receives more than his share of the profits, by an excessive use of the property, as by wearing out the land, or by an improper use of it, as by cutting down the timber and selling it, he cannot be treated as a tort-feasor, but

the remedy of the co-tenant is by an action of account, or a bill in equity for an account: *Walling v. Burroughs*, 8 Ired. Eq. 61. Even if he removes a part of the land, as marl, an action on the case in the nature of waste will not lie, although the land is thereby permanently injured, and made of less value: *Smith v. Sharpe*, Busb. 91 [57 Am. Dec. 574].

A tenant in common of personal property cannot bring trover against his co-tenant, unless the thing is destroyed, either actually or in effect, as by removing it to parts unknown. On the same principle, a tenant in common of land cannot bring an action for waste against his co-tenant, or an action on the case in the nature of waste, which is a substitute for the action of waste, unless there be destruction, so that an action of account, or a bill in equity for an account, would not be available, because nothing was received whereof an account could be taken; for instance, where a tenant in common willfully burns down the houses, or cuts down ornamental shade trees. Indeed, a question may be made, whether a tenant in common can, even for destruction, maintain an action on the case in the nature of waste, for his right to bring an action of waste is given by a different statute than the one which gives the action to a remainderman or reversioner, and the remedy is not by the recovery of damages, but to compel partition, and in the allotment to have the place wasted assigned to the lot of the tenant who committed the waste; whereas the remedy given to a remainderman or reversioner is to recover the place wasted, and also damages for the injury to his fee-simple estate. But we will not enter into this subject, because the point is not presented by the case under consideration, for there is no evidence of destruction or irreparable injury which could not be charged to the defendant in stating an account for what he had received over and above his share of the profits. It is true, the case sets out "it was proved that a permanent and irreparable injury had been done to the land," but this is explained by other parts of the case, and the amount of it is, that the defendant had cleared all of the tract of land which was fit for cultivation, and had by successive crops worn it out, so as to leave no timber for fencing, and no soil on the land, whereby its value, either for sale or use, was much depreciated. Suppose all of this be true, it is only an excessive or improper use of the land, whereby the defendant is liable to be charged in account for the larger amount of profits which he has, or ought to have, received; but it does not

amount to what the law understands to be destruction or irreparable injury, which cannot be compensated for in money, for at most it would only subject the defendant to a charge for the full value of the land, as if he had not made this excessive use of it, or to an extra charge for profits which he ought to have received by reason of such excessive use, supposing it to have been excessive; for under certain circumstances a "prudent proprietor" who owns a body of rich land will clear every foot of it, and put it in cultivation, and depend on getting rail timber and fire-wood from the ridges, if it be in the mountain country, or from the swamps, if it be in the low county. And it would be considered bad management if an owner of river bottoms in the western portion of our state, or of upland dry enough for cultivation in the eastern portion, should let it remain uncleared merely for the sake of the wood; at all events, clearing and cultivating it would not be considered destruction, or such an injury as could be deemed irreparable, and for which damages would not be ample compensation, provided he was able to pay.

Judgment reversed, and a *venire de novo*.

TENANT IN COMMON IS NOT GUILTY OF WASTE in removing fixtures from an old unused mill, and using them temporarily in a mill of his own; nor in burning rotten and useless timber attached to the mill-dam: *Dodd v. Watson*, 72 Am. Dec. 577.

LIABILITY OF TENANT IN COMMON FOR WASTE: See note to *Dodd v. Watson*, 72 Am. Dec. 581; *Hancock v. Day*, 36 Id. 293.

DULA v. COWLES.

[7 JONES'S LAW, 290.]

IN ENTIRE CONTRACT TO DELIVER PORK, the seller cannot recover for any of it until the whole has been delivered.

ABANDONMENT OF CONTRACT, and what acts will constitute it, are matters of law, and should be decided by the court, not by the jury.

CONTRACT REMAINS IN FORCE until it is rescinded by mutual consent, or until the opposite party does some act which amounts to an abandonment.

ASSUMPSIT. In November, 1852, plaintiff sold and agreed to deliver to defendant fifteen hundred pounds of pork on January 1, 1853, at six cents per pound. Defendants agreed to pay therefor, in two notes, a judgment and an account, all of which they held against plaintiff. Plaintiff never delivered any pork until the middle of said January, when he delivered two hun-

dred and seventy-one pounds, which was credited upon one of the notes, leaving a balance still due thereon of nine dollars and forty cents. January 24, 1853, he delivered seven hundred and sixty-two pounds, amounting to forty-five dollars and seventy-two cents; also sold to defendants some other articles for six dollars and forty-eight cents. Defendants credited the whole to plaintiff on the books, and gave another person seventy-five cents, which he charged to plaintiff. He also delivered up the notes. This left a balance due plaintiff of eighteen dollars and forty-nine cents. On the next day plaintiff demanded this balance. Defendant refused to pay it to him because he had not delivered the whole amount he had agreed to deliver, to wit, one thousand five hundred pounds. The court charged the jury that if the parties had not altered the contract in any way, plaintiff could not recover, but that it was competent for them to change the contract if they thought proper; and the only question for the jury to determine was, Had they altered their contract? that there was evidence of a change; that the credit on the note of the value of the first lot of pork, and the delivering up of the notes, was evidence thereof; that if the jury found there had been a change in the contract, and that if the parties intended to settle their accounts as they then stood, plaintiff was entitled to recover. Verdict and judgment for plaintiff. Defendant appeals.

Boydén, for the plaintiff.

Fowle, for the defendant.

By Court, PEARSON, J. The statement of the case now sent does not set out how the remainder of the price of the pork was to be paid. This, we presume, was through inadvertence, as the variance was not referred to on the argument, and in the case when before us, 2 Jones L. 454, it is stated as a fact undisputed, that the balance of the price, if any, was to be paid "one half in goods, the other cash," and when before us, 4 Id. 519, the fact that the remainder of the price was to be paid "one half in goods, the other half in cash," is set out "as admitted by the parties." In all other respects there is no substantial difference in the proof, and we must account for the error into which his honor has fallen by supposing he did not rightly apprehend the principle of the two former decisions.

The principle has been acted upon in two recent cases: *Johnson v. Dunn*, 6 Jones L. 122; *Lane v. Phillips*, Id. 456; and a

majority of this court can see no reason to change their opinion. Indeed, the principle is settled by numerous cases, and the only one which looks the other way is *Carter v. McNecley*, 1 Ired. L. 448; and it is put upon the ground of being excepted from the application of the principle by its peculiar circumstances.

The principle is this, where a contract is entire, and not made divisible by its terms, one of the parties cannot take advantage of his own default, either from laches or from a willful refusal to perform his part, for the purpose of putting the contract out of his way, so as to enable him to maintain *assumpsit* on the common counts, and thereby evade the rule; that while the special contract is in force, general *assumpsit* will not lie, and the contract is considered to remain in force until it is rescinded by mutual consent, or until the opposite party does some act inconsistent with the duty imposed upon him by the contract, which amounts to an abandonment. This is as plain as we can find language in which to state the principle.

What amounts to an abandonment is a question of law, and his honor erred in not deciding it. He also erred in leaving the jury in a situation liable to be misled, in consequence of the indefinite words in which his instructions were given. "It was for the jury to say whether there had been a change or not." What kind of a change? To what extent? In what particulars? In whose favor was the change allowed as an indulgence?

The instruction ought to have been, that the plaintiff was not at liberty to treat the contract as annulled, and could not recover on the common counts, unless the defendants had abandoned the contract, and that to amount to an abandonment they must have done some act which was inconsistent with the duty imposed on them by the contract, and there was no evidence of any such act.

For the sake of illustration: If the contract had been that the remainder of the price of the pork was to be paid in cash, and the defendants had refused to pay the remainder in cash, insisting upon paying half in goods, that would have been an act inconsistent with the duty imposed on them by the contract, and would have amounted to an abandonment; but there was no evidence that such was the contract. The plaintiff, in the last interview, said "he would deliver the balance of the pork the next day, and then see if the defendants would

not pay him:" does this mean pay all of the remainder of the price in cash? If so, that seems to be the kink in this little case, where the cost has already far exceeded the sum in controversy, and "the play has not been worth the candle." Thus furnishing another instance of the fact that small cases are more apt to become complicated than large ones; a skein of silk is more easily tangled than a coil of rope.

On the argument, Mr. Boyden insisted with great earnestness that the delivery of two hundred and seventy-one pounds of pork about the middle of January, and the indorsement of the amount as a credit on one of the notes, was a payment! There can be no doubt of it; and it is exactly what the plaintiff ought to have done, save only that he ought to have delivered the whole, and ought to have done so sooner, to wit, on the day fixed by the contract.

The defendants might have refused to receive this parcel after the day, and sued for breach of contract; surely they were at liberty to indulge the plaintiff by not insisting rigidly upon a strict performance on his part, and such indulgence gave him no cause of complaint; after this the defendants could have sued for a breach of contract in not delivering the balance of the pork within reasonable time. The same remarks are applicable to the delivery of the several parcels; so the defendants had a good cause of action for the non-delivery of the balance; and it would be strange if the plaintiff also can maintain an action treating the contract as nullified; in other words, taking advantage of his own wrong, and making the indulgence extended to him a ground of complaint! The policy of the law is to require parties to perform their contracts in good faith, and this policy should not be defeated by yielding to what may be called a "hard case." If one agrees to sell a horse at the price of one hundred and fifty dollars, the money to be paid at ninety days, and the horse to be delivered when paid for, the vendee fails to pay at the day; afterwards he offers to pay fifty dollars, which is received in part payment; afterwards he pays fifty dollars more, and then refuses to pay the balance—he cannot get the horse, nor can he recover back the money, for it was not "received to his use," but in part payment for the horse. Is it hard that he should lose his money? and is it not right that he should be required to perform his contract, and not be allowed to evade it because he may think it a bad bargain?

One agrees to act as an overseer for one year at two hundred

and fifty dollars; in the middle of the year he does an act which justifies his discharge; he cannot recover the two hundred and fifty dollars, nor can he recover *pro rata* wages: *Lane v. Phillips*, 6 Jones L. 456. If this be not law, the whole current of the cases must be changed.

MANLY, J., dissented.

Judgment reversed, and a *venire de novo*.

WHERE THERE IS ENTIRE CONTRACT, and plaintiff has performed part of it, and without legal excuse, and against the consent of defendant, refuses to perform the whole, he cannot recover anything for the part performed: *Thispen v. Leigh*, 93 N. C. 49; *Lawrence v. Hester*, Id. 81, both citing the principal case; *Smith v. Brady*, 72 Am. Dec. 442, and note 454. In cases of entire contracts, which require partial payments as work progresses, the owner may recover all money paid if the work is not completed by contractor: *Superintendent etc. v. Bennett*, Id. 373, note 378.

IT IS QUESTION OF LAW, AND SHOULD BE DECIDED by the court, not the jury, what acts are required to amount to an abandonment of a contract. To this point the principal case is cited in these cases: *Buſkin v. Baird*, 73 N. C. 283; *Thoroughburgh v. Mastin*, 93 Id. 262.

ACT OF GOD PREVENTING PERFORMANCE will not be such excuse as will authorize plaintiff to recover on an unperformed entire contract: *Doster v. Brown*, 71 Am. Dec. 153, and note 156; but he may in such case recover on a *quantum meruit*.

CONTRACT REMAINS IN FORCE until rescinded by the mutual consent of the parties, or until the opposite party does some act which amounts to an abandonment. This doctrine is approved and the principal case cited in the following-named cases: *Jones v. Mial*, 89 N. C. 92; *Farr v. Whittington*, 72 Id. 221; *Russell v. Stewart*, 64 Id. 487.

WHAT WILL BE ABANDONMENT: *McMahon v. Miller*, 82 N. C. 322, citing the principal case. See also *Jones v. Mial*, Id. 255, 256.

CASES
IN THE
SUPREME COURT
OF
OHIO.

ASHBROOK v. HITE.

[9 OHIO STATE, 357.]

**PARTIAL PAYMENT ON CONTRACT CANNOT BE RECOVERED by a party who
has made default in the fulfillment of the contract.**

ASSUMPSIT. The amended petition stated that defendant agreed to sell to plaintiff a number of sheep, to be weighed and delivered on a day certain. Before the day of delivery, the plaintiff requested defendant to rescind the contract and to refund the fifty dollars so paid. This the defendant refused to do, but thereafter, and before the bringing of this action, he sold said sheep to other persons. Wherefore plaintiff asks judgment for said fifty dollars and interest. A demurrer to the insufficiency of these facts was affirmed by the district court, and this ruling is assigned for error.

Hunter and Daugherty, for the plaintiff in error.

Martin and Schleich, for the defendant in error.

By Court, SCOTT, J. The question in this case arises upon the sufficiency of the facts stated in the amended petition of the plaintiff to constitute a cause of action.

The petition, it will be observed, does not allege that the sheep were sold by the defendant to other persons before the day fixed by the contract for their delivery to the plaintiff. The allegation is merely that they were thus sold before the bringing of the suit, and the suit was not brought till about four weeks after the time of delivery agreed upon. It would be entirely consistent with the statements of the petition to as-

sume that the alleged sale was made a week or a day before suit brought. There is also an entire absence of any allegation that the plaintiff was ready and willing, at the proper time and place, to perform the contract on his part by accepting the delivery and paying the residue of the contract price. And the defendant is charged with no such default as a refusal to weigh and deliver the sheep to the plaintiff at the proper time and place upon the payment of the residue of the purchase-money. Now, as the plaintiff's right of recovery must rest on the facts stated in his petition, he must recover, if at all, let the facts which are not stated be as they may, and they are therefore to be assumed most strongly against him in determining upon the sufficiency of his petition. We must therefore take it for granted that the failure in the full execution of this contract was caused solely by the default of the plaintiff himself; that he, without any excuse, refused to accept and complete the payment for the sheep, as he was bound by contract to do, although the defendant, at the proper time and place, was willing and offered to perform fully on his part.

The question, then, is whether a subsequent resale of the property by the vendor to another, under these circumstances, will, *per se*, give the original vendee any legal claim upon him in respect to the partial payment previously made under the contract.

The plaintiff's counsel seem to assume in their argument that the agreement stated in the petition is such as to constitute a completed sale, and that the property in the sheep, though not the right of possession, passed by the contract to the purchaser. But the petition describes the contract rather as an agreement for a future sale and delivery. "He agreed to sell," etc., "to be weighed and delivered at," etc., "on or before," etc.; and it is certain that the sheep were to be weighed and their price thus ascertained before delivery by the vendor, or at least not by the purchaser alone. Under these circumstances, the rule is that the property does not pass: 1 Parsons on Cont. 440, 441. Such sale is, at most, but conditional; the weighing and delivery on the one side, and the payment of the remaining purchase-money on the other, are conditions precedent to the passing either of the right of property or the right of possession.

By the terms of the contract in this case, we have no doubt that the sheep were to be kept until the day of delivery, by the vendor, at his own expense and risk. But were it otherwise,

the petition evidently does not contemplate a recovery of the value of the sheep as upon an unlawful conversion of them to the defendant's use. It is not averred, generally, that the sale was wrongful, nor are facts stated which show it to have been so. It may have been made upon due notice to the vendee, in the proper assertion of the vendor's lien for the unpaid balance of the purchase-money, and the proceeds may have been insufficient to satisfy the lien. And even if it appeared that the proceeds were more than sufficient to satisfy the lien, yet the plaintiff does not seek to recover the overplus, but evidently proceeds on the ground that the sale of the sheep by the defendant to other persons operated, *ipso facto*, as a rescission of the plaintiff's contract, and gave him the right to be restored to the condition in which he was before entering into it, by a return of the money paid upon it. It is for this he asks judgment; and this is the main ground taken in argument. Is it tenable? The petition shows, as we have seen, that the failure of the parties fully to execute this contract was owing solely to the plaintiff's default; that the defendant fully discharged all his obligations, so far as the plaintiff's default would permit; that he retained the ownership of the sheep merely because the plaintiff, without excuse, refused to permit him to divest himself of it according to the terms of their agreement. By such default, the plaintiff would seem to have lost or renounced all his conditional interest in the property. Can it be true, then, that any subsequent exercise by the party not in default, of the rights incident to the absolute ownership thus forced upon him, and involuntarily retained by him, may be regarded by the defaulting party as a rescission of the contract?

The doctrine is apparently novel. We have been referred to 1 Parsons on Cont. 190, 191, in support of it; but we do not think the views of counsel are sustained by the authority. On the contrary, we find the doctrine thus stated by him: "Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded by the consent of all, but this consent need not be expressed as an agreement. If either party, without right, claims to rescind the contract, the other party need not object, and if he permits it to be rescinded, it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party, in order to give to the other the right of consenting, and so rescinding. There may be many acts from which the opposite

party has a right to infer that the party doing them would rescind; and, generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded. But not if he has been guilty of a default in his engagement, for he cannot take advantage of his own wrong to defeat the contract." There are many authorities sustaining the principle last stated in this extract. In *Ketchum v. Everton*, 13 Johns. 359 [7 Am. Dec. 384], it was said by the court (Spencer, J.): "It may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have themselves rescinded the contract. It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case. The plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subsequent sale of the land gives a right to the plaintiff to recover back the money paid on the contract, would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfill it; it was in vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell. This would be most unreasonable and unjust, and is not sanctioned by any principle of law."

This case, it will be perceived, grew out of a contract for the sale of real estate. The purchaser made a partial payment on the contract, but afterward refused to execute it further. Upon

a subsequent resale of the premises by the vendor, the purchaser brought this action of *assumpsit* to recover the money paid on the contract. The case is analogous to the present one, and the reasoning of the court is entirely applicable here.

The same principle is affirmed in *Hudson v. Swift*, 20 Johns. 23; *Green v. Green*, 9 Cow. 46; *Battle v. Rochester City Bank*, 5 Barb. 414; 1 McLean, 242. And such, upon principle, must be the strict legal rule.

The sale of the property in this case by the defendant was not in violation of his obligations under the contract, but the mere exercise of his rights, in accordance with its implied stipulations. And the plaintiff having by his voluntary default abandoned the contract, the defendant might certainly maintain an action against him for its breach, and at the same time treat the property as his own. Both these rights are co-existent, and the assertion of the one does not preclude the exercise of the other. If he failed to make himself whole by the resale of the property at a fair price, he might proceed by action to recover such damages as would make up the deficiency. There is no injustice in this. It merely places the party not in default where he would have stood had the agreement been performed. But if the resale of the property was *per se* a rescission of the contract, no action could thereafter be maintained upon it, and this measure of justice would be denied to a blameless party.

We are fully aware that embarrassing questions have arisen, and that a conflict of authorities may be found in cases somewhat analogous to the present, where a party has sought to recover in *indebitatus assumpsit* for a part performance of a special contract for the sale and delivery of personal property at a specified time and place, and to be paid for thereafter on a day certain, and where the plaintiff has failed without sufficient excuse to deliver the whole within the time limited. The right to such relief was denied in *Witherow v. Witherow*, 16 Ohio, 238. That was a case of some hardship, and the propriety of a rigid application of the rule in such a case may certainly be questioned. But the propriety of any rule which would encourage the violation of contracts is at least equally questionable.

The rule in New Hampshire proceeds on the principle of giving compensation for the breach, and requiring the party not in default to account for any excess of benefit he has received from part performance: *Britton v. Turner*, 6 N. H. 481

[26 Am. Dec. 713]. And certainly no rule is admissible which would be more favorable to the party in default.

It does not appear, in this case, that the plaintiff's default was other than purely voluntary, or that the defendant has received from him anything which, under the circumstances, it would be against equity or good conscience to retain. If the plaintiff have merits, they are not disclosed by his petition. And it will be time enough to overrule or narrow the application of the doctrine in *Witherow v. Witherow*, 16 Ohio, 238, when a case is presented requiring such action in furtherance of justice.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

PARTY IN DEFAULT ON ENTIRE CONTRACT CANNOT RECOVER FOR PART PERFORMANCE either on the contract itself or in general *assumpsit*: *Leonard v. Dyer*, 68 Am. Dec. 382; and *Winstead v. Reid*, 57 Id. 571, and note 572.

WHEN COMPLETE PERFORMANCE OF CONTRACT IS NECESSARY before recovery can be had: See *Smith v. Brady*, 72 Am. Dec. 442, and note 454.

STURGES v. WILLIAMS.

[9 OHIO STATE, 443.]

INSERTING PLACE OF PAYMENT IN NOTE PAYABLE GENERALLY DISCHARGES INDORSERS, if such alteration is made without their knowledge or consent.

DRAWER OF BILL AND INDORSER OF NOTE PAYABLE GENERALLY DO NOT OCCUPY ANALOGOUS POSITIONS, and the principle allowing the drawee of a bill to insert a place of payment does not authorize the payee of a note to make a similar alteration.

ASSUMPSIT. Defendant indorsed a note which was payable generally. The payee, without his knowledge or consent, inserted in the body of the note the words "payable at the office of Sturges & Hale," and then transferred the same. A verdict for defendant at common pleas, on the ground that this alteration discharged his liability, was affirmed by the district court, and this judgment is assigned for error.

R. P. Spalding and H. Griswold, for the plaintiffs.

Ranney, Backus, and Noble, for the defendant.

By Court, SCOTT, J. The alteration, by which the defendant in this case claims to have been discharged, was made by interlining in the body of the note the words "payable at the office of Sturges & Hale." Questions have frequently arisen

upon the effect of a memorandum, made at the bottom or in the margin of a note, designating a place of payment, as to the point whether such memorandum forms a part of the contract, so as to constitute an alteration therein. But no such question arises here; for the alteration, whether material or not, was incorporated into the note, and made to constitute part of its terms.

The principal, if not the only, questions which the case presents are: Was the alteration a material one as to the indorser? And if so, was it unauthorized by him? If either of these questions can be properly answered in the negative, the defendant was not discharged by the alteration; but if both questions must be answered affirmatively, the alteration discharges him, upon clear and well-settled principles.

As to the first point, then, it would seem clear, that if, by giving effect to the alteration, the contract of the indorser is substantially changed, then the alteration is material as to him. It is not necessary to the materiality of the alteration that it be such as must necessarily prejudice the defendant, nor that the proof show him to have been in fact damnified by the change. For, occupying the position of a surety, he may insist on the very terms of his contract. And if these terms are substantially varied, without his consent, he may well say that the new contract is one into which he never entered.

Now, what was the contract of the indorser, as it stood when the note in question left his hands? The note was payable generally, and the indorsement was in blank. This indorsement, taken in connection with the contract of the maker, as shown by the face of the note, constituted, by force of the commercial law, a definite contract. Its terms were, substantially, that he, the indorser, would pay the amount of the note to the holder if, at its maturity, upon demand made of the maker, either personally or at his domicile or usual place of business, payment should be refused, and due notice of such dishonor should be given to the indorser.

This contract could not have been made more definite and certain by reducing its terms to writing. Is it, then, substantially varied by the subsequent alteration? Had the indorser consented to making the note payable at the office of Sturges & Hale, or had such been its terms at the time of indorsement, his contract, by the same commercial law, would have been that he would pay to the holder the amount of the note, if, at maturity, upon demand made at the specified place, pay-

ment should be refused, and due notice of dishonor given. Indeed, the note having been negotiated to Sturges & Hale, the liability of the indorser would become fixed, if at its maturity there were no funds of the maker in the hands of the holders applicable to its payment, and proper notice of dishonor were given. The effect of this alteration, then, is to dispense with the demand upon the maker personally, or at his residence or place of business, and thus to waive everything calculated to call the attention of the maker to the subject when the note matures.

Now, so far from its being true that this does not change the contract of the indorser, its principal effect would seem to be upon that very contract. The demand of payment at maturity is necessary only for the purpose of charging the indorser. The right of action against the maker is perfect without it.

But it is said that as the drawee of a bill of exchange payable generally may, by special acceptance, payable at a particular place, make a demand at that place sufficient to bind the drawer, so, on the same principle, the accommodation indorser of a promissory note payable generally may be bound by a place of payment specially designated by the maker before negotiation. The analogy between the position of the parties to a bill of exchange and the corresponding parties to a promissory note is not complete until the acceptance of the bill. The drawing of the bill must precede its acceptance; whilst the contract of indorsement is posterior to the making of the note, and is made with reference to its terms already expressed on its face.

The right to make such alteration in or addition to the terms of a note after indorsement, if conceded to the maker, might certainly be so exercised as greatly to prejudice the indorser. If made payable at a distant point, without his knowledge, he might find himself made liable by notice of dishonor, received days or weeks after he had every reason to suppose the risk terminated. He might be willing to become surety for the prompt payment of a note by the maker, provided his attention would be called to the subject by a personal demand at maturity, but be unwilling to risk its dishonor without such demand. At all events, he had a right to make his own contract, and insist on its terms. It was not competent for other interested parties, by a subsequent alteration of this written evidence, to vary his obligations without his consent, although it may not appear that the change was in fact prejudicial to him.

The decision of the supreme court of New York, in the case of *Bank of America v. Woodworth*, 18 Johns. 315, and the opinion of Chancellor Kent, in the same case, in the court of errors, 19 Id. 391, seem to be strongly relied on by counsel for the plaintiffs. That was the case of a memorandum, made upon the margin of a note, designating the place of payment, which, it was held by the supreme court (Spencer, C. J.), did not form any part of the contract, and therefore did not discharge the accommodation indorser, though made without his knowledge. But in the court of errors it was held otherwise, as well upon principle as upon a review of the authorities, notwithstanding the able opinion of Chancellor Kent to the contrary; and this decision, made in 1821, has ever since remained the law of that state. We think it rests upon principles which cannot be successfully controverted.

As to the unauthorized character of the alteration in this case, it may be sufficient to say that it is admitted to have been made without the knowledge or express consent of the defendant; and as the note, when indorsed, was without blanks, full and perfect in all its parts, there is nothing apparent from which such consent can be inferred or presumed. The conditions upon which his liability depended were material and important elements of his contract, and an unauthorized alteration, by which those conditions would be substantially modified, must operate to discharge him. And the fact that the plaintiffs would not, as their counsel claim, have consented to discount the note without the alteration, only demonstrates more clearly the impropriety of subjecting the rights and obligations of a party, under his contract, to such modification as the convenience or interest of others may dictate.

Judgment of the district court affirmed.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

MATERIAL ALTERATION OF NEGOTIABLE INSTRUMENT WILL RENDER IT INVALID, even in the hands of an innocent holder, as against any party thereto not consenting to the alteration. And this rule applies to an accommodation note fraudulently altered before it is negotiated: *Frigg v. Taylor*, 72 Am. Dec. 263. The other cases in the series on this subject are collected under *Miller v. Reed*, 67 Id. 459.

THE PRINCIPAL CASE IS CITED in *Myers v. Standart*, 11 Ohio St. 39, to the point that the drawee of a bill of exchange may upon acceptance insert a place of payment therein without changing the contract between the drawer and payee.

WILSON v. STILWELL.

[9 OHIO STATE, 467.]

OBLEGEE MAY, AFTER DEFAULT, MAINTAIN ACTION ON BOND BEFORE HE IS DAMNIFIED, if the obligation of the bond is for the performance of an affirmative act; but if the obligation is simply to indemnify, damages must be shown before he can recover.

CREDITORS OF FIRM ARE PROPER PARTIES DEFENDANT IN ACTION ON BOND given by one member of a firm to a retiring member to save the latter against the outstanding obligations of the firm.

ACTION ON bond. At the dissolution of the firm of J. M. Tooker & Co., which was composed of the defendant Stilwell and J. M. Tooker, the latter agreed to pay all the debts of the firm, and gave to Stilwell a bond, with Wilson, the plaintiff, as surety, to the effect that "the said John M. Tooker shall settle up and liquidate all the just claims against said firm of J. M. Tooker & Co." Certain firm debts remained unpaid, and were prosecuted to judgment against Stilwell, who brought this action in the court below against the obligors on the bond, making the holders of these firm debts parties defendant. Judgment was rendered in favor of Stilwell, and against Wilson and Tooker for the amount of the unpaid claims. Wilson appeals, assigning this judgment for error.

Collins and Herron, for the appellant.

J. Burnet, for the appellee.

By Court, **BRINKERHOFF, C. J.** The phrase "settle up and liquidate," in the condition of this bond, taken in connection with the accompanying recital, is equivalent to the word "pay," and imposes the obligation to pay all the debts of the late firm of J. M. Tooker & Co., and is readily distinguishable from an obligation to indemnify against a liability to pay. And the doctrine seems to be now well established, by a current of decisions both in this country and in England, that if there be a contract to indemnify simply, and nothing more, then damage must be shown before the party indemnified is entitled to recover; but if there be an affirmative contract to do a certain act, or to pay a certain sum or sums of money, then it is no defense to say that the plaintiff has not been damnified; and that the measure of damages in such case is the amount agreed to be paid, or the proper expense of doing the act agreed to be done: *Port v. Jackson*, 17 Johns. 239; S. C. in error, Id. 479; *Mann v. Eckford*, 15 Wend. 502; *Ex parte Negus*, 7 Id. 490:

Loosemore v. Radford, 9 Mee. & W. 657; *Lathrop v. Atwood*. 21 Conn. 117.

But it is argued with great force by Waite, J., dissenting, in the case last above cited, and by Mr. Sedgwick, in his work on the measure of damages (p. 306), that the doctrine thus settled in favor of the right to recover at law in a case like this, to the full amount agreed to be paid, is wrong in principle; because, it is said, a court of law having no power to direct and control the application of the amount recovered, the obligor, if he be primarily liable, as Tooker was in this case, might be compelled to pay the same debt in substance twice—once to the obligee of the bond, and again to the original creditors; and that the same principle ought to operate in favor of the surety, whose liability in law cannot be extended beyond that of his principal.

It must be confessed that these considerations, as applied to a recovery in a court and in an action, at law strictly, are entitled to very great weight; and, as Mr. Sedgwick remarks, serve to illustrate "the inconvenience and serious hardships that often flow from the separation of the jurisdictions" at law and in equity. But the objection thus forcibly urged to the doctrine as applied in cases at law by courts destitute of equity jurisdiction has no application to the case before us. This being a case under the code, and the court below exercising jurisdiction in equity as well as at law, and competent to administer equitable as well as legal remedies, very properly saved the rights of the obligors of the bond and defendants in the judgment by ordering the creditors of the firm to be made parties, and permitting the obligors to pay off the creditors of the plaintiff, and to have the amount thus paid credited upon the judgment. And this, we think, ought always to be done where any party in interest, whether creditor or obligor, demands it.

Judgment affirmed.

SCOTT, SUTLIFF, PECK, and GHOLSON, JJ., concurred.

THE PRINCIPAL CASE IS CITED IN *Johnson v. Britton*, 23 Ind. 105, to support the position that where the vendor of land agrees with the vendee to pay off a mortgage then upon the land, and fails so to do, the vendee may recover the amount of the mortgage from the vendor as soon as the same matures, and before he has paid the money due thereon, or has suffered an eviction; also to the point that in such action the mortgagee is a proper party defendant. A state of facts similar to the foregoing arose in *Gewel v. One*, 72 Id. 34, and the principal case is cited in support of the same points. At the dissolution of a

partnership, one partner gave to the retiring member his promissory note for the latter's interest in the partnership property, and agreed to pay all the firm's debts, except a certain outstanding note which the latter assumed. In an action by the retiring partner, on the note given him for his interest in the partnership property, the maker was allowed a set-off for the amount of the note assumed by plaintiff, it not having been paid, and the principal case is cited in support of this ruling. *Wilson v. Stihoe*, 14 Ohio St. 484, was a continuation of the litigation commenced in the principal case, and the latter is cited generally in support of the propositions laid down therein.

KNOX COUNTY BANK v. DOTY.

[9 OHIO STATE, 506.]

JUDGMENT UPON WARRANT OF ATTORNEY MAY BE SET ASIDE ON MOTION, unless proof of its execution was made, and the original or a copy thereof was on file at the time of the rendition of the judgment.

VOLUNTARY PAYMENT OF JUDGMENT BY DEBTOR IS BINDING upon him if made with full knowledge of the facts affecting its validity, but otherwise if made in ignorance of these facts.

PAYMENT OF JUDGMENT IS NOT VOLUNTARY when it is made to release property held under execution or to prevent property from being seized.

ASSUMPSIT. Plaintiff had judgment for a balance due on a bill of exchange against defendants S. Doty, M. S. Doty, David Loyd, and R. Thompson, upon a warrant of attorney, no process having been served upon any of them. On motion, the judgment was vacated on the ground that the warrant of attorney was not on file, and defendants were allowed to answer. This action of the court of common pleas was affirmed by the district court, and is now assigned for error.

H. B. Curtis and Scribner, for the plaintiff in error.

Delano, Sapp, and Smith, for the defendants in error.

By Court, PECK, J. The taking of judgment in the Morrow common pleas upon a warrant of attorney, without its production and proof of its execution, and without filing the original warrant, or a copy of it, at the rendition of the judgment, was an irregularity for which the judgment so taken might be vacated and set aside upon motion to the court in which it was rendered: Secs. 380, 534, and 535 of the code of civil procedure; and such motion prior to as well as since the code might be made at the term in which such judgment was rendered, or at a subsequent term: *Huntington v. Finch*, 8 Ohio St. 445; sec. 535 of the code.

Loyd, one of the defendants at the term in which it was

rendered, filed his motion to vacate the judgment for this cause, and that motion was regularly continued from term to term, until it was finally disposed of by setting aside the judgment. A motion thus made, continued and determined, is, in legal contemplation, as if made and decided at the trial term. A motion to vacate a judgment for irregularity is a "proceeding" authorized by the code, and as such is amendable. There was not, therefore, any error in permitting the defendant Thompson to become a party thereto, at the second term after rendition of the judgment, such amendment being authorized by section 137 of the code; and, as we have already seen, an original motion might have been filed by Thompson at the time such amendment was made.

But it is claimed that shortly after the rendition of said judgment, Loyd and Thompson voluntarily paid and discharged the same, and should not now be suffered to deny its binding obligation when rendered. There is no doubt but that the voluntary payment of a judgment by the debtor therein, if made with a full knowledge of the facts affecting its validity, will have the effect claimed; but there must be a concurrence of both volition and knowledge. If paid voluntarily, but in ignorance of the facts affecting its validity, or if the payment was not voluntary, though the party paying was aware of the facts rendering it invalid, such payment will not preclude the judgment debtor from questioning its validity. It is apparent from the facts and circumstances set forth in the bill of exceptions, that at the time Loyd and Thompson paid off said judgment, an execution issued thereon was in the hands of the sheriff of Morrow county, upon which a horse, saddle, and bridle, the property of Loyd, had been seized, and were then in the hands of the sheriff, and that he had been instructed by the plaintiff to levy said execution upon the grocery store and goods, then and there in the possession and ownership of Thompson, unless the judgment should be paid off; and as they severally testify, Loyd's object was to release his property thus seized and held upon execution, and Thompson's to prevent the seizure of his store and goods, and the injuries and discredit such a course would occasion to him. These facts would seem to bring the case within the principle stated by Ranney, J., in *Mays v. Cincinnati*, 1 Ohio St. 278, that a payment is not voluntary "when it is made to procure the release of the person or property of the party from detention, or where the other is armed with apparent authority to seize upon either,

and the payment is made to prevent it." Such a payment not having been voluntary, it is unnecessary to examine the point, much mooted by counsel, as to the full knowledge or ignorance of Loyd and Thompson, of the facts affecting the validity of the judgment. We do not think them estopped, by reason of such payment, from vacating the judgment.

If the money had been collected by a levy and sale, and the judgment thereby satisfied, there could be no doubt but that the judgment could have been reversed, notwithstanding the satisfaction; and we see no difference in principle between the two cases.

It appears from the record that the defendant never, in fact, executed such a bill or such a power as are set forth in the petition and answer. The bill of exchange which they did execute was one drawn upon J. E. Miles, No. 8 Washington Market, and the power of attorney was to confess a judgment upon that bill. The petition describes a bill drawn by defendants upon Atwood & Co., of Wall street, New York, and the power of attorney is to confess a judgment upon that bill. The record shows that no service, actual or constructive, was ever made upon the defendants, and that no authority was ever delegated by them to any attorney to appear and confess judgment upon the bill set forth in the petition. It was, then, an appearance and confession by an attorney without any warrant or authority for so doing, and the record therefore shows that the Morrow common pleas, in fact, had no jurisdiction over the persons of the defendants. The appropriate remedy in such a case is by motion to the court in which the judgment was rendered, at the same or a subsequent term: *Abernathy v. Latimore*, 19 Ohio, 288; *Hunt v. Yeatman*, 3 Id. 16.

The proofs taken upon the motion to vacate render it highly probable that defendants are indebted to the plaintiff upon another and different bill of exchange; and it is urged that inasmuch as courts, in motions to set aside judgments at a subsequent term, exercise an equitable jurisdiction (*Huntington v. Finch*, 3 Ohio St. 445), such vacation should not be permitted in this case, because, though not indebted for the cause of action described in the petition, they are indebted to a similar amount upon another cause of action which the plaintiff ought to have declared on. This, it seems to us, would be an extension of this rule of equitable adjustment somewhat novel in its character, dangerous in its application, and far beyond any precedent which can be found. The record of the judg-

ment by confession contains no means of identifying the bill upon J. E. Miles with that declared on. Section 538 of the code, which provides that a judgment shall not be vacated on motion until it is adjudged that there is a valid defense to the action, was intended to apply to cases where the ground of the motion is that the party had a defense which he for some cause was prevented from setting up, and not to cases where, as in the case at bar, there is confessedly no such cause of action, or where the court had no jurisdiction over the person of the defendants.

It is also insisted that the judgment of the district court should be reversed, because it merely dismisses the petition, and does not affirm the judgment of the court of common pleas, and award restitution of the money paid upon the judgment. It is sufficient for us to say that if the order of the district court is liable to these objections, and as to which we make no intimation, they are not errors of which the plaintiff can complain, and the defendants have not seen fit to do so, except in their brief.

Judgment and order of district court affirmed.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and GHOLSON, JJ., concurred.

JUDGMENT ON WARRANT OF ATTORNEY MAY BE VACATED ON MOTION under the former practice in Ohio: See note under *Bank of Wooster v. Stearns*, 59 Am. Dec. 623.

JUDGMENT CONFERRED FOR PARTY BY ATTORNEY WITHOUT AUTHORITY is invalid: *Sherrard v. Neves*, 52 Am. Dec. 508, and note 510.

PARISH v. PARISH.

[9 OHIO STATE, 584.]

DECREE OF DIVORCE A VINCOLO IS CONCLUSIVE, AND CANNOT BE REVIEWED upon an original bill on the ground that it was fraudulently obtained.

ACTION in common pleas to set aside a decree of divorce obtained on false evidence at a previous term. A demurrer was sustained, and this ruling is assigned for error.

Ranney, Backus, and Noble, and G. W. King, for the complainant.

Daniel Parish, defendant, argued the case on his own behalf.

By Court, PECK, J. This cause is now before us for disposition upon the demurrer, filed by the defendant to the bill filed in the court below. The defendant assigns various causes for demurrer, relating principally to the form and sufficiency of the allegations of the fraudulent acts and conduct on the part of the defendant in the procurement of the decree for divorce, and the absence of necessary averments to show the materiality of the testimony fraudulently procured. But as these objections, if well taken, would only result in amendments of the bill, we have merely bestowed upon them a passing notice, as we are all satisfied that the eighth assignment is fatal to the present proceeding, and is one which no amendment of the bill could remedy. The eighth assignment is: "That the decree in said divorce suit of *Daniel Parish v. Mary Parish* [which the bill of the said Mary seeks to review and reverse] was and is final and conclusive [between the parties], and cannot be reviewed or annulled [by original bill or otherwise]." This is an original bill, filed in the Brown county court of common pleas, to vacate and annul a decree of divorce from the bonds of matrimony, pronounced by that court between the same parties at a former term. This vacation is claimed on the ground that the original decree was procured by the complainant in that proceeding by means of false and fraudulent representations as to his true residence, the willful suppression of the published notices of its pendency, and the false testimony of witnesses suborned by him. The demurrer, by its legal operation, admits a state of facts in regard to this transaction, and the agency of the defendant therein, which place him in no enviable position, and does not commend him or his cause to the favorable consideration of a court. For the honor of human nature, it is to be hoped that the facts alleged in the petition, in regard to the procurement of the decree are not true in fact, though, for the purpose of the demurrer, they are to be taken as admitted. Indeed, if a case could be supposed in which a decree *a vinculo*, by a court having jurisdiction over person and subject-matter, could be vacated at a subsequent term by reason of its fraudulent procurement, it would seem that such a case is presented in the bill under consideration.

The statute of March 14, 1843, conferring jurisdiction in divorce cases upon the courts of common pleas, which was in force when these proceedings were had, provides that no "appeal shall be obtained from the decree, but the same shall be final and conclusive:" Curwen, 991. This statutory provision is nothing more than a legislative recognition of the principle

of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the *status* of married persons, by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who wrongfully, perhaps, procured its promulgation: See *Bascom v. Bascom*, 7 Ohio, 466; *Laughery v. Laughery*, 15 Id. 404; *Tappan v. Tappan*, 6 Ohio St. 64; *Lucas v. Lucas*, 3 Gray, 136; and *Greene v. Greene*, 2 Id. 361 [61 Am. Dec. 454].

The case of *Greene v. Greene*, *supra*, is, in many respects, analogous to the case at bar. It was an original libel for a divorce *a vinculo*, in which the libelant sought a divorce from her husband for the causes authorized by the statutes of Massachusetts, and set forth that her husband, at the preceding November term of that court, had, by means of false testimony, procured a divorce *a vinculo* from the libelant for the alleged cause of adultery, and asked that the former decree might be annulled for the fraud in its procurement, and a decree granted to her for the causes set forth. Chief Justice Shaw, in a very elaborate opinion, in which he examines all the cases, as well as the reasons upon which the rule of public policy is founded, refused the relief asked, holding that a decree from the bonds of matrimony, though obtained by fraud and false testimony, cannot be set aside on an original libel filed at a subsequent term, and concludes his opinion in these words: "We have seen no reliable authority opposed to the position above taken, that a decree of divorce *a vinculo*, when no appeal, review, or writ of error is allowed by law, or where the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and that an original proceeding to set it aside on the ground that it is fraudulently obtained upon false evidence cannot be maintained." This case seems to be decisive of the point, and is amply sustained by principle and authority. We have, however, been referred to two cases as establishing, or tending to establish, a different rule. The first of these, *Allen v. Maclellan*, 12 Pa. St. 328 [51 Am. Dec. 608], is one where the validity of a decree annulling a former decree for fraud in obtaining it came collaterally in question, in a suit between other parties upon a promissory note, and it was held that as to such third persons, the last decree not having been

set aside by the parties nor reversed upon appeal, was conclusive. This case by no means decides that such a decree of reversal, if contested at the time, would ever have been entered. But the inference, from some of the remarks of Chief Justice Gibson, is the other way. The other case is *Vischer v. Vischer*, 12 Barb. 640. The parties were originally married and domiciled in New York, where the wife obtained a divorce *a mensa*. The husband then removed to the state of Michigan, the wife still remaining in New York. The husband obtained a divorce *a vinculo* in Michigan, for willful desertion, no process or personal notice having been served upon the wife. He then returned to New York and married another, and the first wife applied for a divorce *a vinculo*, for adultery. The husband, in bar of the application, set up the previous divorce in Michigan; but the court held that that decree was no bar, because the court in Michigan had never acquired any jurisdiction by service of process upon or appearance of the wife.

It is difficult to see how this case decides that a court has the power to reverse or annul its own decrees entered at a previous term. The decree in New York does not attempt to annul the decree in Michigan, but merely disregards it. That decree still stands upon the records in Michigan, in full force and unreversed, and should occasion and opportunity offer, would doubtless be enforced by their courts. Again: though there was not any actual service upon Mrs. Parish in this case, and though, for that cause, it might be disregarded in New York or elsewhere, still the court in Brown county had jurisdiction of the subject-matter and of the parties—of the one by his appearance, and of the other by publication in a newspaper, which, under our statute, is as effective in conferring jurisdiction as actual service. The courts in New York might, for this cause, hold the decree void, but the Ohio courts must regard the Brown county common pleas, in the original divorce suit, as having acquired jurisdiction over persons as well as subject-matter. We therefore feel compelled, though reluctantly, to hold that sound public policy, in this class of cases, forbids us from setting aside a decree of divorce *a vinculo*, though obtained by fraud and false testimony, on an original bill filed at a subsequent term.

Demurrer sustained, and bill dismissed.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and GHOLSON, JJ. concurred.

JUDGMENTS OF DIVORCE CANNOT BE VACATED under the statutes of Ohio and Iowa allowing courts to set aside or modify judgments "for fraud practiced by the successful party in obtaining the judgments." See note under *Burham v. Hays*, 58 Am. Dec. 395.

DECREE OF DIVORCE OBTAINED BY FRAUD MAY BE SET ASIDE AT SUBSEQUENT TERM by the court of common pleas, although a marriage was contracted on its faith and issue born: *Allen v. Maclellan*, 51 Am. Dec. 608, cited and disapproved in the principal case.

FRAUD AND COLLUSION VACATE ALL JUDGMENTS AND DECREES when properly pleaded and proved; as a decree of divorce in fraud of the law of the domicile of the parties: *Harding v. Allen*, 23 Am. Dec. 549.

THE PRINCIPAL CASE IS CITED in *Neil v. Neil*, 38 Ohio St. 559, to the point that it is the settled law in Ohio that orders granting divorces are not reviewable; also in *Knapp v. Thomas*, 39 Id. 377, to the same point.

PIERSON v. SMITH.

[9 OHIO STATE, 554.]

WIFE'S CHOSES IN ACTION ARE NOT LIABLE FOR HUSBAND'S DEBTS unless he has reduced them to possession in the exercise of his marital rights.

RECOVERY OF JUDGMENT IN HUSBAND'S NAME ON WIFE'S PROPERTY is only *prima facie* evidence of an intention to appropriate the same to his own use.

INTERVENTION by wife. Plaintiff brought an action against T. K. Smith, and attached a judgment in his favor, which he had recovered against a railroad company for the loss of his wife's baggage. Smith's wife, defendant, answered, claiming said judgment as her separate property, having been recovered for the loss of her trunk, wardrobe, and other property, exclusively her own, and asking that the attachment be dissolved, and for an injunction. Judgment in favor of defendant is assigned for error.

Collins and Herron, for the plaintiff in error.

Piatt, for the defendant in error.

By Court, SCOTT, J. The act of February 28, 1846, "in relation to the interest of husbands in the estate of their wives" (Swan's Stat. 712, 713), provides as follows:

"Sec. 3. No interest of a husband in any chose in action, demand, legacy, or bequest of his wife shall be liable to be taken by any process of law or chancery for the payment of his debt, unless such husband shall have reduced the same to possession, so as, by the rules of law, to have become the owner thereof in his marital rights," etc.

"Sec. 4. All articles of furniture and household goods which a wife shall have brought with her at marriage, or shall have come to her by bequest, gift, or which shall have been, after marriage, purchased with her separate money or other property, shall be exempt from liability for the debts of her husband during the life of the wife, and during the life of any heir of her body."

We think there is no room for doubt in this case that the trunk with the wearing apparel and other articles which it contained were the separate property of Mrs. Smith, and that under a fair and reasonable construction of the section last cited, according to the manifest spirit and policy of the act, all these articles were exempt from liability for her husband's debts.

But the defendant in error, against her will, has been deprived of these articles of property by the wrongful act of a third party, against whom a judgment has been recovered, in the name of her husband, for their value. And it is now claimed that the fund into which her property has thus been converted has, by means of the premises, been reduced to the possession of the husband, so as to become liable for his debts. Is this so?

That a husband may reduce to possession a chose in action of the wife by recovering a judgment thereon in his own name, during coverture, is unquestionably true: *Dixon's Adm'r v. Dixon*, 18 Ohio, 113. But will the law conclusively give this effect to the recovery of such a judgment, without regard to the intention of the parties?

To effect a reduction to possession of a chose in action, there must be some act done by the husband, evincing an intention to appropriate it to his own use. A recovery of judgment thereon, in his own name, is certainly *prima facie* evidence of such intention. Such recovery of judgment, if obtained in the assertion of his marital rights, would be a conclusive act of appropriation. But the presumption of an intention to appropriate the chose in action to his own use, which arises from the mere use of his name in a suit prosecuted and judgment rendered thereon, may, we think, be rebutted by circumstances. Even the reception of payment by the husband would not constitute a reducing to possession, if, in the transaction, he acted merely as the agent of his wife, and not in the exercise of his marital rights. And we think the circumstances shown by the evidence in this case clearly disprove any intention, on the

part of T. K. Smith, to appropriate his wife's property to his own use. He may, perhaps, have acquiesced in the use of his name by his wife, in a suit brought at her instance to recover the value of her own property, lost by the wrongful act of a third party. But in this, it is fairly to be inferred that he acted merely as a trustee, holding the legal title for the benefit of his wife. Being unable to repair her loss from his own means, he had no equitable or moral right to do or intend otherwise, to her prejudice; and there is no evidence of any such inequitable purpose on his part.

It is very clear that the defendant in error has never intended to part with her interest in the property; and the husband having made no intentional appropriation of it to his own use, we think the debt sought to be attached by the plaintiff in error is, in equity, still the property of the wife, and as such is protected by the statute as against the creditors of her husband.

Judgment of superior court affirmed.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

HUSBAND'S CREDITORS CANNOT LAY HOLD OF WIFE'S PROPERTY FOR SATISFACTION OF THEIR DEBTS until the husband's marital right is complete by a reduction of the property into possession, or what is equivalent thereto: *Harris v. Taylor*, 67 Am. Dec. 576, and note 579.

WILSON v. TAYLOR'S EXECUTORS.

[9 OHIO STATE, 556.]

COVENANTOR CANNOT BE SUBJECTED TO DIFFERENT ACTIONS FOR SAME BREACH OF SAME COVENANT, brought by a number of subsequent grantees.

ACTION on covenant against incumbrances contained in a number of successive conveyances. Weis, the last covenantee, suffered a partial eviction, and brought his action on the covenant against each one of the covenantors, recovered judgments against each in various amounts, and collected all his judgments. Wilson, who was an intermediate covenantor, to reimburse himself, brought this action against the executors of Taylor, who was the first covenantor, and who, as well as plaintiff, had already paid a judgment to Weis on the same covenant. These facts being substantially set forth in defend-

ant's rejoinder, plaintiff demurred to their sufficiency as a defense. Cause reserved in district on this demurrer.

Smythe and Sprague, for the plaintiff

William Stanbery, for the defendant.

By Court, BRINKERHOFF, C. J. The covenant in this case sued on was a covenant running with the land; and Weis, the last grantee, having been evicted from part of the land embraced within the successive covenants of warranty, brought several actions simultaneously against each of the successive covenantors, and recovered several judgments against each. This, it seems to be settled, he might properly do: *King v. Kerr*, 5 Ohio, 155; *Foote v. Burnet*, 10 Id. 317 [36 Am. Dec. 90], and notes. But though he might have his several actions, either simultaneously or successively, against all his covenantors, whether immediate or mediate, yet it is equally well settled that he could have but one satisfaction.

It seems that, for some unexplained reason, judgments in these several actions, thus simultaneously brought against the successive covenantors, were taken for very different amounts, varying from about two hundred and eighty dollars to about four hundred and fourteen dollars. And Taylor, the first covenantor, having paid and satisfied the judgment against him, and which was among the smallest in amount, the question presented by the demurrer is, whether this satisfaction of the judgment against him is a bar to an action over against him by the plaintiff, who was an intermediate covenantee, after payment by the latter of a judgment recovered at the same time.

The question seems to be one of first impression, and our minds are not free from difficulty in regard to it; but on the whole, we are unanimously of opinion that the plea is good. As before remarked, Weis, the last covenantee, and who suffered damage by reason of partial eviction, was entitled to his several action against all the prior covenantors. Not only was his right of action perfect against all, but the same rule of damages would apply as to all; and although he could have but one satisfaction, yet he was clearly entitled to recover the full amount of his damages against each. If he failed to make the proper showing in order to recover the full amount of his damages against each, it was his own fault; and having collected and received the amount recovered against the first covenantor, who occupied the position in law of a guarantor

of all the subsequent grantees, it seems to us that Weis's claim under all the covenants must be held satisfied; and that all enforcement of the judgments against the other intermediate covenantors was wrongful, and in violation of the principle that he could have but one satisfaction. Taylor ought not to be subjected to different actions, and liable to several recoveries, for the same breach of the same covenant.

It follows from this that the plaintiff has mistaken his remedy. He ought, after the satisfaction by Taylor of the judgment against him, to have either resorted to a court of equity to restrain the collection of the judgment against himself, or, if circumstances forbade that, to have sued to recover back the money he had paid on the judgment against him, as for money had and received by Weis wrongfully, and which in conscience he ought not to retain.

Demurrer overruled, and cause remanded.

SCOTT, SUTLIFF, PECK, and GHOLSON, JJ., concurred.

WELSH v. PITTSBURG, FORT WAYNE, AND CHICAGO RAILROAD COMPANY.

[10 OHIO STATE, 65.]

COMMON CARRIERS ARE RESPONSIBLE AS INSURERS for the safe transportation and delivery of goods received by them for carriage, and can only excuse a default when occasioned by act of God or public enemies.

COMMON CARRIERS CANNOT EXEMPT THEMSELVES BY SPECIAL CONTRACT FROM LIABILITY FOR NEGLIGENCE, although they may thus limit their extraordinary responsibility as insurers of the goods received by them for carriage. This rule applies with peculiar force to railroad corporations.

ACTION against the defendant, as a common carrier of live-stock, to recover for the loss of certain cattle. It appeared from the agreed statement of facts that one of the plaintiffs, William S. Welsh, on September 26, 1856, called at the defendant's freight office at Bucyrus, Ohio, to ascertain whether cars previously engaged by him for the shipment of the cattle in question were ready. The cars were pointed out to Welsh, who examined them, and found the doors of several of them defective. Welsh called the attention of the defendant's agent to the defects, and the agent promised to make the necessary repairs. The plaintiffs, relying upon this promise, drove on the next day from their home, ten miles distant, to Bucyrus over three hundred head of cattle. The repairs had not

been made, but the cattle were loaded upon the cars, and the defective doors fastened as well as was possible. The plaintiffs thereupon signed a contract by which they agreed "to assume all the risks of transportation." The train with the cattle, accompanied by Welsh, left Bucyrus late in the evening, and after running twelve miles with ordinary care, one of the defective doors dropped out, and six of the cattle were lost. Another defective door dropped out soon afterwards, and six more of the cattle were lost. The court of common pleas rendered judgment for the defendant. A motion to set aside the judgment and for a new trial was overruled, and the plaintiffs then filed their petition in error in the district court. The cause was reserved for decision by the supreme court.

D. W. Swigart, for the plaintiffs.

J. D. Sears, for the defendant.

By Court, SCOTT, J. At common law, it has been long settled that the common carrier is responsible for the safe transportation and delivery of goods received by him for carriage, and can only justify or excuse a default when occasioned by the act of God or the public enemies. He is not only responsible for his own acts of malfeasance, misfeasance, and negligence, in the course of his employment, but he is also regarded as an insurer against all loss or damage which may happen to goods whilst in his charge for the purposes of his employment, though occasioned by unavoidable accident or by any casualty whatever, except only as above mentioned. And the burden of proof is thrown upon him in bringing any particular case within the exceptions. For in the absence of proof, the loss itself raises the presumption of negligence on the part of the carrier.

This extent of liability and unfavorable presumption to which the carrier is subjected by common law is supposed to be justified by grave considerations of public policy growing out of the character of his employment. And we may safely say that experience has amply vindicated the practical wisdom and propriety of the rule.

As to the power of the common carrier to restrict or limit this high degree of responsibility which is imposed upon him by the common law, the authorities are by no means agreed, either as to the extent to which such limitation may be carried or the mode in which it may be effected. The English decisions generally, as well as many in this country, recognize the

right of the carrier to limit and qualify his liability by general notice brought home to the knowledge of the owner of the goods, and not objected to by him. His acquiescence in such cases has been inferred from his silence. But it has been forcibly urged, on the other hand, that where a party is under obligation to carry upon the general terms of liability imposed by the law, it is more reasonable to infer from the silence of the parties that the carrier receded from terms which he had no right to impose, than that the customer waived what he had a legal right to demand. It has accordingly been uniformly held in this state that the common carrier cannot thus relieve himself from responsibility by his own act: *Jones v. Voorhees*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Id. 362 [62 Am. Dec. 485].

But that the liability of the carrier may be qualified and limited, by special contract, is well settled. It is true that even this right was denied, upon grounds of public policy, in New York, in the case of *Cole v. Goodwin*, 19 Wend. 251 [32 Am. Dec. 470], and in the subsequent case of *Gould v. Hill*, 2 Hill (N. Y.), 623. But these cases have been since overruled: *Parsons v. Monteath*, 13 Barb. 353; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 136; *Stoddard v. Long Island R. R. Co.*, 5 Id. 180. The authority of *Gould v. Hill*, *supra*, was also denied by the supreme court of the United States, in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. That such restriction may be provided for by contract has been affirmed in this state, in the cases already referred to in 2 Ohio St. [*Davidson v. Graham*], and 4 Ohio St. [*Graham v. Davis*, 62 Am. Dec. 285].

But to what extent this exemption from liability may be affected by the special contract of the parties is a question of much importance, and upon which the authorities are less uniform.

Many of the English cases seem to recognize the right of a common carrier to stipulate for exemption from all liability, even for gross neglect or positive misfeasance. Thus in *Maving v. Todd*, 1 Stark. 72, it was held, by Lord Ellenborough, that common carriers may make their own terms, and wholly exclude their responsibility; to which he adds: "I am sorry the law is so; it leads to very great negligence." And in *Leeson v. Holt*, Id. 186, where the carrier has given notice that articles of the particular kind involved in that case were to be entirely at the risk of the owners as to damage, breakage, etc.,

Lord Ellenborough, in summing up to the jury, said: "In the present case, the carriers seem to have excluded all responsibility whatever, so that, under the terms of the present notice, if a servant of the carriers had, in the most willful and wanton manner, destroyed the furniture intrusted to them, the principals would not have been liable. If the parties have so contracted, the plaintiff must abide by the agreement." So in the much more recent case of *Chippendale v. Lancashire and Yorkshire Railway Co.*, 7 Eng. L. & Eq. 395, which in its circumstances closely resembles the case at bar. In that case the plaintiff had received from the railway company a ticket for cattle which were to be conveyed for him on the company's road. This ticket was signed by the plaintiff, and contained at the bottom the following clause: "N. B. This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage, howsoever caused, and occurring to live-stock of any description, traveling upon the L. & Y. railway, or in their vehicles." The plaintiff saw the cattle put into the truck. Some of the cattle broke out of the truck on the journey and were injured; and the jury, having found that the truck in question was so defectively constructed as to be unfit and unsafe for the purpose of conveying cattle along the line, assessed the plaintiff's damages. The court nevertheless directed a verdict to be entered for the defendant, holding the company protected from liability by the terms of the ticket. This judgment was affirmed by the court of queen's bench.

This decision, with several others to the same effect, was, since the enactment of the common carrier's act of 11 Geo. IV. and 1 Wm. IV., c. 68, by the sixth section of which all cases of special contract are excepted from its operation. These decisions, under that act, seem to establish, in England, the right of the common carrier by express contract to exempt himself from liability for anything short of actual malfeasance.

But in this country, whilst the right of a carrier is generally recognized to contract for exemption from that extraordinary responsibility imposed by the common law, which makes him an insurer, yet the validity of contracts providing for exemption from liability for his own misfeasance or gross negligence has been frequently, if not generally, denied, upon grounds of public policy. In the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, it was held by the supreme court of the United States that a common carrier may by contract

divest himself of that character in respect to any particular transaction, so as to incur only the responsibility of an ordinary bailee for hire, and be liable for misconduct or negligence only. In *Sager v. Portsmouth, S. & P. & E. R. R. Co.*, 31 Me. 228 [50 Am. Dec. 659], it was held that a common carrier is liable for the damages occasioned by his negligence or misconduct, notwithstanding a notice or contract to the contrary; and also that the want of suitable vehicles in which to transport articles is negligence on the part of a carrier.

In some cases a distinction has been taken between the degrees of negligence, which, in the case of railroad transportation, is not always of easy application.

Mr. Story, in his commentaries on the law of bailments, sec. 562, 6th ed., on the authority of *Chippendale v. Lancashire and Yorkshire Railway Co.*, 7 Eng. L. & Eq. 395, before referred to, says that "proof of a special contract with the consignor may exonerate a carrier from a loss through defective vehicles if the terms of such contract be sufficiently broad." But in this he is perhaps to be understood as speaking only of the English decisions under the common carrier's act. In treating of the effect of general notices, he says (sec. 571 a): "At all events, such notices will not exempt the carrier from responsibility for losses occasioned by a defect in the vehicle or machinery used for the transportation; for there is a breach of the implied warranty in such cases that the vehicle and machinery shall be in good order or condition, and fit for the business or employment, and it will amount to negligence if they are not in such condition."

And in Angell's law of carriers, sec. 275, it is said that "the utmost effect which can be given to a general notice, or special contract, although as broad and absolute in its terms as it can be, will not discharge a common carrier from liability for negligence, misfeasance, or want of ordinary care, either in the seaworthiness of the vessel or her proper equipments and furniture; nor is it allowed to exempt the carrier from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used in the transportation.

As this whole subject, in its application to railroad transportation, is comparatively a new one, the want of harmony, which is apparent in the views of writers and the decisions of courts in the different states, is by no means surprising. But this irreconcilable conflict has left us at liberty, in this state, to adopt such rules and follow such precedents as, in our judg-

ment, are sanctioned by the principles of justice, and by considerations of public policy.

The agreed statement of facts in this case shows clearly that the plaintiffs' loss was occasioned by the defective condition of the doors of the stock-cars in which the cattle were conveyed. The doors were imperfect and their fastenings broken, in consequence of which one of them dropped out, in running twelve miles, with ordinary and proper care, and six of the cattle escaped or were lost. Another door, thus defective, dropped out soon afterward, and six cattle more were lost. These defects in the doors and their fastenings were well known to both the parties when the cattle were loaded, and the plaintiffs expressly agreed to assume the risks arising therefrom. The petition avers, and the answer does not deny, that the defendant was a common carrier of live-stock. Independent of the agreement of the parties, there can be no doubt that the defective and broken condition of the car doors would constitute gross negligence on the part of the carrier, and fix the liability of the defendant. But if the contract be valid, it is equally clear that the plaintiffs have no legal ground of complaint. Hence the question is directly made, upon the validity of the contract, Can a common carrier thus exempt himself from liability for his own negligence? In the case of *Davidson v. Graham*, 2 Ohio St. 131, although this question was not directly presented, the contract in that case having no relation to the negligence of the carrier, yet the whole subject was quite fully considered by the court; and whilst that particular contract was held valid, because it only exempted the defendants from liability for the dangers of the river, fire, and unavoidable accidents, in respect to which the common-law rule made them insurers, yet the whole court concurred in saying that the common carrier cannot relieve himself to any extent by special contract from losses occasioned by his own neglect; and that, though he may by contract restrict his liability as an insurer against losses arising from mistake or unavoidable accident, against which human prudence could not provide, yet that he cannot stipulate for a less degree of care and diligence, in the discharge of his duty, than that which pertains to his trust as a bailee for hire.

This subject was again reconsidered in the case of *Graham v. Davis*, 4 Ohio St. 362 [62 Am. Dec. 285], in which the question was more directly presented. The contract, in that case, exempted the defendants from liability for losses arising

from the dangers of the river navigation, fire, and unavoidable accident. The boat in which the goods were carried was sunk by striking a snag in the river; and it was held that the defendants could escape liability only by proof that the accident could not, by care, have been prevented. The authorities were again reviewed in that case, and the court again held that "if the loss was occasioned by negligence, whether slight or gross, it was not within what was or could have been made by contract an exception to the liability of the carrier."

It is true that in neither of these cases did the contract stipulate that the consignor should assume the risks of the carrier's negligence; but the extent of the carrier's liabilities, his power to qualify or restrict them by contract, and the public policy which limits this power, were subjects which incidentally arose in both cases, and were evidently considered with care.

With the conclusions reached in these cases by our predecessors, we are well satisfied, and think they should be affirmed upon this direct presentation of the question.

In this state, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the state. They have been permitted to exercise the right of eminent domain, in condemning and appropriating private property to the construction of great thoroughfares for general travel and transportation of the produce of the country. In the prosecution of this business, in which the whole community is so vitally interested, it is but reasonable that they should employ a degree of care and diligence proportioned to the magnitude of the interests with which they are intrusted, and the peculiar perils likely to result from negligence in a mode of transportation necessarily dangerous. Morality and public policy alike refuse their sanction to contracts which tend to produce a reckless disregard of this high duty, by releasing the party from all liability for the consequences of its gross violation. A public agent has no right to stipulate for impunity whilst wantonly endangering the lives or sacrificing the property of others.

The obligations of the defendant, in this case, were not created wholly by special contract, and some of them, at least, could not be thus canceled or thrown off.

The facts in this case, as shown by the agreed statement, strongly illustrate the impolicy of enforcing such special contracts. The plaintiffs were, in effect, compelled by circumstances, and as a choice of evils, to sign the contract upon which the defendant relies, and thus, at the moment of loading their cattle, to take upon themselves the risk of defective cars and broken and dilapidated doors, which the defendant, through its agent, had previously promised them to have repaired and made safe. The plaintiffs, relying upon this promise, had brought more than three hundred head of cattle to the station at Bucyrus, ten miles from home. These cattle they were, doubtless, anxious to forward, without delay, to their place of destination. The defendant could, under the circumstances, and therefore did, impose upon them such conditions of risk as were alike inconsistent with the previous understanding of the parties, and with the duty resulting from the public employment in which the defendant was engaged.

If such a contract be valid, it would be equally so if it cast upon the plaintiffs all the risks of negligence, however gross, in the management and running of the train; for the defendant was under no higher obligation to discharge this duty properly than to provide safe and suitable cars.

Indeed, we believe it has been sometimes claimed that a carrier may, by contract, escape liability for the negligence of servants, though not for his own. This doctrine, when applied to a corporation, which can only act through its agents and servants, would secure complete immunity for the neglect of every duty.

We have no hesitation in saying that the plaintiffs in this case should have had judgment. The judgment of the court of common pleas will therefore be reversed, and the cause remanded.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

COMMON CARRIERS ARE RESPONSIBLE AS INSURERS for the safe transportation and delivery of goods, and are only excused for default occasioned by act of God or public enemies: *Norway Plains Co. v. Boston etc. R. R.*, 61 Am. Dec. 423; *Dill v. South Carolina R. R.*, 62 Id. 407; *Owners of Steamboat Farmer v. McCraw*, Id. 718; *Powell v. Mills*, 64 Id. 158; *Moses v. Boston etc. R. R.*, Id. 381; *New Brunswick etc. Co. v. Tiers*, Id. 394; *Phileo v. Sanford*, 67 Id. 654; *Cox v. Peterson*, 68 Id. 145; *Cooper v. Barry*, Id. 468; *Porter v. Chicago etc. R. R.*, 71 Id. 286; *Ferguson v. Brent*, Id. 582.

COMMON CARRIERS CANNOT EXEMPT THEMSELVES BY SPECIAL CONTRACT FROM LIABILITY FOR THEIR NEGLIGENCE or that of their servants: *Graham v. Davis*, 62 Am. Dec. 285; *Bentley v. Bustard*, 63 Id. 561, and notes thereto; note to *Clarke v. Rochester etc. R. R.*, 67 Id. 215. The principal case is cited to this effect in *Cleveland etc. R. R. v. Curran*, 19 Ohio St. 12; *Cincinnati etc. R. R. v. Pontius*, Id. 235; *Union Express Co. v. Graham*, 26 Id. 598; *United States Express Co. v. Backman*, 28 Id. 150; *Melfield School District v. Boston etc. R. R.*, 102 Mass. 556; *Railroad Co. v. Lockwood*, 17 Wall. 369; *Ohio etc. R'y v. Setty*, 47 Ind. 486; *Indianapolis etc. R. R. v. Allen*, 31 Id. 401, note.

COMMON CARRIERS MAY LIMIT COMMON-LAW LIABILITY BY EXPRESS CONTRACT: *Dorr v. New Jersey Steam Nav. Co.*, 62 Am. Dec. 125, and note; *Graham v. Davis*, Id. 285; *Kimball v. Rutland etc. R. R.*, Id. 567; note to *Clarke v. Rochester etc. R. R.*, 67 Id. 213; *Baker v. Brinson*, Id. 548; *Cooper v. Berry*, 68 Id. 468; *Thomas v. Ship Morning Glory*, 71 Id. 509; *Gooley v. Pennsylvania R. R.*, 72 Id. 703. The principal case is cited on this point in *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 438; *Baltimore etc. R. R. v. Campbell*, 36 Id. 658.

COMMON CARRIERS CANNOT EXEMPT OR LIMIT LIABILITY BY GENERAL NOTICE: *Dorr v. New Jersey Steam Nav. Co.*, 62 Am. Dec. 125; *Kimball v. Rutland etc. R. R.*, Id. 567; *Moses v. Boston etc. R. R.*, 64 Id. 381, and notes thereto. The principal case is cited on this point in *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 438; *Baltimore etc. R. R. v. Campbell*, 36 Id. 658; *Cincinnati etc. R. R. v. Pontius*, 19 Id. 235.

LEWIS v. TIPTON.

[10 OHIO STATE, 88.]

NOTE IS PAYABLE WITHIN REASONABLE TIME AFTER ITS EXHIBITION AND DELIVERY, where the maker promises by it to pay a certain sum of money "when I can make it convenient, with ten per cent interest till paid."

ACTION originally brought on June 26, 1856, before a justice of the peace, upon the following note: "June 20, 1855. For value received, I promise to pay to the order of James A. Tipton ninety-five dollars, current money of Ohio, when I can make it convenient, with ten per cent interest till paid. Samuel Lewis [seal]." The plaintiff had judgment, and upon appeal to the court of common pleas, he filed a petition upon the note, describing it as a promise to pay when convenient, and alleging a demand and failure to pay, and that a reasonable time had elapsed. The defendant answered, denying that he had promised in manner and form, etc. The cause was submitted to the court, who found for the plaintiff. The defendant moved in arrest of judgment, on the grounds: 1. That the note was not due when sued upon; 2. That the petition did not contain sufficient averments to warrant the judgment; and 3. That the note created no legal liability upon the defendant.

The motion was overruled, and to reverse the judgment, the defendant filed a petition in error, assigning as causes: 1. The overruling of the motion in arrest of judgment; 2. That judgment was rendered in favor of the plaintiff when it should have been for the defendant.

Lewis and Cushing, for the plaintiff in error.

L. Perry, for the defendant in error.

By Court, PECK, J. No argument has been presented upon either side, and the only question which seems to be raised by the assignments in error is in regard to the construction and legal effect of the note upon which suit was brought.

It would seem from the petition filed by the plaintiff below that he regarded the note as a promise to pay the money specified therein within a reasonable time, while we infer from the assignments of error that the defendant below regards it as not creating any legal liability upon him to pay at any time whatever; that its future payment rests entirely upon his volition and sense of honor. Is this a just interpretation of the paper? It opens with an admission that he has received from the payee full value for his promise, by the words "for value received, I promise," etc., and closes with a stipulation that it is to bear "interest at the rate of ten per cent till paid." The payee parted with something valuable to obtain the promise; and is it reasonable to suppose that it was parted with and received as a mere gratuity, which would be the fact if there was to be no legal obligation to return an equivalent? Why go through the useless formality of giving and receiving a written paper which was not, after all, to evidence any right or create any obligation? and why fix a high rate of interest "till paid," if there was never to be any payment except at the option of the signer?

The parties evidently regarded the note as a binding obligation and not the acknowledgment of a mere moral obligation; and whenever the language will permit, it should be so construed as to support rather than to destroy its legal obligation.

It is conceded that the intention of the parties to a contract cannot prevail if directly contrary to the plain sense of the words employed; but when the intention is sufficiently apparent, effect should be given to that intent, though some violence be thereby done to the words: *Wilson v. Bevan*, 7 Com. B. 673. The payee certainly parted with its value to secure the promise, and the maker not only admits this, but promises to pay

interest thereon while the payment is forborne. If the convenience of the maker alone is to be consulted, he might never find it altogether convenient to pay, and the construction leads to results certainly not contemplated by the parties when the note was written. In *Guier v. Page*, 4 Serg. & R. 1, it was ruled that a sale for "approved paper" means, in law, a sale for paper which ought to be approved, and not for such paper as the seller should in fact approve; that is, that the seller, by such contract, had no right to withhold his approval of paper to which there was no reasonable objection. So in *Moore v. Woolsey*, 4 El. & Bl. 243, S. C., 82 Eng. Com. L. 252, 256, where, by the terms of a policy of insurance, proof of interest in case of loss was to be made to the satisfaction of the directors, it was held that such a provision required merely that such proof should be laid before the directors as ought to satisfy reasonable men, and that they could not arbitrarily refuse to be satisfied. The same principle is also recognized in *Ex parte Lord*, 16 Mee. & W. 466, and in *Ex parte Nowlan*, 6 T. R. 118, and applied to cases arising under the statutes in regard to bankruptcy. The principle deducible from these cases and others that might be cited as applied to the case at bar is, that if the right was reserved to the maker of the note sued on to determine when it might be convenient for him to pay, it is nevertheless a right which he must exercise reasonably and with a just regard to the rights of others.

It would seem to follow that the note in and of itself would become due and payable in a reasonable time after its execution and delivery; such reasonable time being a question to be determined in view of all the circumstances.

In the recent work of Edwards on Bills of Exchange and Promissory Notes, 154, note 4, the learned author says: "So it has been held that a note by which the maker promised to pay a certain sum 'when it is convenient,' is due within a reasonable time." The case in which it was so decided is not specially named, but the decision certainly accords with the analogies of the law and the manifest justice of such a case, and we may therefore properly adopt it.

Where no time is fixed and no contingency specified upon which payment is to be made, the note is held to be payable immediately: *Thompson v. Ketcham*, 8 Johns. 190 [5 Am. Dec. 832]; such being the manifest intention of the parties. But where, as in the present case, the promise is to pay when convenient, and a stipulation is added, that the note is to bear

interest until paid, it is manifest that an immediate payment was not contemplated by the parties. While, therefore, we are satisfied that the note sued on created a valid obligation to pay, we also hold that it was not payable until a reasonable time had elapsed. Suit was not brought in the present case till more than a year after the note was executed, and the petition avers that a reasonable time had elapsed. The court, in finding the issue for the plaintiff, must have been satisfied of the truth of that averment of the petition. The case of *Barnard v. Cushing*, 4 Met. 230 [38 Am. Dec. 362], "where the payees of a note, at the time it was signed by the maker, and as part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it," and in which case the court held that the payees could never maintain an action thereon, may be thought to be in conflict with the view we have taken of the case at bar. In that case, however, the court place great stress upon the promise never to compel its payment—regarding it as an express stipulation that the action of the maker was not to be hastened by any compulsory proceedings by the payees; and it was in view of this express waiver of all right of action upon the note that the court in that case held that no action could ever be maintained upon the note. Whether the court were correct in the view there expressed, we need not now determine, as it is sufficient to say that no such waiver exists in the present case. We are clearly of opinion, upon principle as well as authority, that the court below did not err in overruling the motion in arrest; nor in rendering judgment upon the note in favor of the plaintiff.

Judgment affirmed.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and GHOLSON, JJ., concurred.

THE PRINCIPAL CASE IS DISTINGUISHED in *Johnston v. Grist*, 85 Ind. 505, in that in it there was a promise to pay money, while in the case at bar an instrument which read, "This will certify that I do give to C. R. J. one hundred dollars, the money to be paid as soon as my financial condition will allow; and if I do not live to pay it, I wish it paid out of my estate," was not a promise to pay money, but a promise to make a gift, and no action could be maintained thereon.

OWEN v. MILLER.

[10 OHIO STATE, 128.]

PRINCIPLE THAT PERSONAL PROPERTY FOLLOWS DOMICILE OF OWNER HAS NO PROPER APPLICATION where an attempt is made to take it from him against his consent, but applies only where the claim of the owner ceases by his death intestate, or by his voluntary transfer.

ATTACHMENT PROCEEDINGS AGAINST ABSCONDING DEBTOR CAN ONLY BE REGARDED out of the jurisdiction as proceedings against property, and property not within the jurisdiction cannot be affected.

PROPERTY IS IN THAT STATE WHERE MAKER OF NOTE RESIDES, and not in state where note is held; and therefore the seizure and sale of an undorsed promissory note payable to order, in one state, under attachment proceedings against the payee as an absconding debtor, will not divest his property in the debt, evidenced by the note, in another state, where the maker resides.

SALE OF PROMISSORY NOTE UNDER ATTACHMENT PROCEEDINGS IS UNAUTHORIZED by the statutes of New Jersey, Nixon's Digest, 38, it seems, and is void. Such sale does not, therefore, affect the payee's right to recover the debt from the maker, nor is the assignee entitled to a credit for the amount received on the sale, and applied to the payment of the debts of the payee.

ASSIGNEE OF NOTE AT INVALID SALE UNDER ATTACHMENT PROCEEDINGS gets no aid from the Ohio act of 1846, "for the protection of purchasers at judicial and tax sales."

ACTION in which the plaintiff asked judgment for the amount of certain notes secured by a mortgage, and for the sale of the mortgaged premises, or a judgment for the possession of the land. On March 21, 1843, the plaintiff conveyed the land to the defendants, Arthur Carmichael and John Wiley, and took their notes, payable to order in five and eight years, secured by a mortgage on the land. The plaintiff, after the sale, returned to his residence in New Jersey, where, on November 21, 1845, attachment proceedings were taken against him as an absconding debtor, under which the notes were seized and sold. The notes were not indorsed by the plaintiff, and were assigned by a writing upon them, reciting the proceedings. The record of these proceedings did not show that the court ever confirmed the sale and distribution made by the auditors, nor that the defendant was personally served or appeared. One Jonathan S. Christie became the owner of the notes, and on March 6, 1847, sold them to Wiley, who had purchased the rights of Carmichael, subject to the mortgage. Wiley gave new notes in payment to Christie, and to secure the same, he and his wife executed a mortgage on the land. Christie transferred the notes and mortgage to one William S. Conant, who, on March 9, 1848, foreclosed the mortgage, and the defendant

Miller became the purchaser at the sale, and received the deed. Miller stated, as a counterclaim, that should his title fail, he was entitled to a credit for the amount applied to the payment of the debts of the plaintiff by the proceedings in New Jersey, and that under the Ohio act of March 2, 1846, entitled "An act for the protection of purchasers at judicial and tax sales," he was entitled to be subrogated to the rights of the creditors of the plaintiff. The statutes of New Jersey, Nixon's Digest, 38, provided that not only money, goods, and chattels might be seized under a writ of attachment, but also bonds, bills, notes, papers, or other writings; and also that if the sale of the goods, chattels, lands, and tenements did not produce money sufficient to pay the debts, the auditors "shall assign to the said plaintiff and creditors the choses in action, rights, and credits of the said defendant, . . . which assignment shall vest the property and interest of the said defendant in such assignee so as he may sue for and recover the same in his own name, and for his own use; . . . and the moneys which may be received by virtue of such assignment shall operate as payment."

P. Bunker, and J. H. and H. C. Godman, for the plaintiff.

O. Bowen and J. Bartram, for the defendant.

By Court, GHOLSON, J. Personal property has been said to have no *situs*, but to follow the domicile or person of the owner. Thus, in case of intestacy, the law of the place where the owner of personal property had his domicile governs its distribution, wherever it may be situate; and in case of a transfer of personal property valid by the law of the place where it is made, effect will be given to it in the place where the property in fact exists, unless some policy of the local law be infringed. But this principle properly applies only where the claim of the owner ceases, as in case of intestacy, by death, or where by his voluntary agreement he has parted with his claim. It has no proper application where an attempt is made to take the property from him against his consent. The rules of law on this subject are clearly expressed in a case decided in the state in which the proceedings were had, upon the effect of which we are to decide. "The general principle is fully and unequivocally settled that personal property is transferable according to the law of the country where the owner is domiciled. A transfer of personal property, therefore, good by the law of the owner's domicile, or by the laws of the place where it is made, is valid wherever the property may be situate:" *Frazier v. Fred-*

ericks, 24 N. J. L. 162, 166, citing Story's Confli. L., secs. 383, 384; 2 Kent's Com. 454; *Varnum v. Kamp*, 13 N. J. L. 329 [25 Am. Dec. 476]; *et vid.* *Thomson v. Advocate-General*, 12 Cl. & Fin. 1; *Bunbury v. Bunbury*, 1 Beav. 320, 328; *Black v. Zacharie*, 3 How. 483. "The principle applies to a voluntary conveyance of property by the owner, not to a conveyance by operation of law. An assignment by law has no legal operation out of the territory of the law-maker. Such, at least, is conceded to be the decided weight of American authority:" *Frazier v. Fredericks*, 24 N. J. L. 166, citing *Milne v. Moreton*, 6 Binn. 361 [6 Am. Dec. 466]; *Blake v. Williams*, 6 Pick. 307 [17 Am. Dec. 372]; *Holmes v. Remsen*, 20 Johns. 266 [11 Am. Dec. 269]; Story's Confli. L., sec. 410; 2 Kent's Com. 406; *et vid.* *Speed v. May*, 17 Pa. St. 91 [55 Am. Dec. 540]; *Booth v. Clark*, 17 How. 322; *Hoyt v. Thompson*, 5 N. Y. 320, 353; S. C., 19 Id. 207.

It appears to be generally conceded that, as a matter of comity, an assignee in bankruptcy or under insolvent proceedings may, in another jurisdiction, the claims of creditors in that jurisdiction not interfering, sue to recover the personal property of the bankrupt or insolvent. A suit for such purpose, whether allowed in the name of the bankrupt or of the assignee, when commenced by the assignee, ought not to be defeated by the act or release of the bankrupt: *Holmes v. Remsen*, 20 Johns. 229, 267 [11 Am. Dec. 269]; *Abraham v. Plestoro*, 3 Wend. 539, 550, 551 [20 Am. Dec. 738]; *Hoyt v. Thompson*, 5 N. Y. 320, 346; S. C., 19 Id. 207-226. It would seem to follow that property which might be recovered by suit might be obtained by the assent or agreement of the parties interested: *Bank of Augusta v. Earle*, 13 Pet. 519, 591. Upon these principles, if the claimant under the proceedings in attachment stood in the position of the assignee of a bankrupt, or of a receiver of an insolvent company or corporation, a settlement made with the debtor might present plausible grounds for its enforcement. But in the class of cases in which this comity has been exercised, there was jurisdiction over the person, which has been regarded as giving the assignee or receiver a *quasi* authority, even beyond the jurisdiction of the court appointing him, as the agent and representative of the owner of the property. The very foundation of the principle assumes that there was jurisdiction over the person, and it is in no respect based upon a jurisdiction over the thing.

It thus appears that whether this application of the principle of comity be correct or not, it has no bearing upon the

present case. We have here no jurisdiction over the person. Such proceedings in attachment as the present very clearly lay no foundation out of the jurisdiction in which they are instituted, for any personal claim, or for any claim which supposes a personal authority proceeding from the party against whom they are directed. Out of that jurisdiction, the proceedings can only be regarded as proceedings against property; and property not within the jurisdiction cannot be affected. It is a fundamental principle, that no man is to be deprived of his property without his consent, or by due process of law. To constitute due process of law and make it effectual to change the title to property, there must be jurisdiction over the person of the owner or over his property.

We are brought, then, to the simple question whether the promissory notes given for a debt being in New Jersey, and the makers of the notes or the debtors, residing in Ohio, the property was in New Jersey or in Ohio. In substance, there is a sum of money in the hands of one man to which another has title or claim, and the evidence of that title or claim is a promise in writing to pay the money. Upon principle, it would seem clear that the subject-matter to which the title or claim relates is the property, and not the evidence showing the title or claim.

This question has arisen in cases involving the jurisdiction to grant administration or letters testamentary. Of such cases it has been said: "As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and title to property, it was established as law that judgment debts were assets for the purpose of jurisdiction, where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be; simple contract debts where the debtor resides at the time of the testator's death; and it was also decided that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found:" *Attorney-General v. Bouwens*, 4 Mee. & W. 171-191.

The payee of a promissory note has a property vested in him, but it is in action, not in possession: 2 Bla. Com. 468. It consists in the contract of the maker, and this contract has been said to differ from other contracts in two important par-

ticulars: 1. It is assignable, whereas a chose in action at common law is not; and 2. The instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it: *Foster v. Dawber*, 6 Exch. 839, 853. This difference may lead to the idea that there is property in the evidence of the contract; but really the contract constitutes the property, it is property in action. The thing in action has peculiarities which distinguish it from other things in action, but it is still, in law, a thing in action.

The effect of a seizure of a note under process of law can gain no force from the rules of the commercial law, which rules are only intended to regulate the right of parties depending upon their voluntary acts and agreements. The seizure of a note payable to bearer, or indorsed in blank, would not constitute the officer an indorsee or holder in the commercial sense of those terms. The officer would hold under the statute giving him the authority to seize, and not by contract. He would have the rights which that statute gave, and not those of an indorsee or holder, in the usual course of business. It might happen that a subsequent holder of a note payable to bearer, or indorsed in blank, seized by an officer and put in circulation, would have the right to enforce its payment. But it would be upon the same principle that a note of like description, lost or stolen, might be a valid claim in the hands of an innocent holder. No such principle applies in this case. The notes were payable to order, and not indorsed by the payee, but were assigned by a writing on the notes, in such a way as to show clearly the origin of the title.

In accordance with these views, we feel bound to come to the conclusion that the proceedings in attachment in New Jersey have not divested the plaintiff of the right to recover the debt due to him from a resident in this state, and secured by a mortgage upon property in this state. It is a harsh proceeding and likely to lead to great sacrifice of property, to sell a debt, even when the tribunal has jurisdiction over the debtor, but when the debtor resides in a distant state, it must almost invariably prove ruinous to the owner of the debt. We should not feel called upon by any principle of comity to give effect to such a proceeding.

We have considered the question in the strongest light in which it can be placed for the defendant, but while we are diffident in expressing an opinion as to the law of another state, in opposition to the action of its officers, we strongly in-

cline to the conclusion that the statutes of New Jersey do not contemplate a sale of a debt where the debtor resides in that state, and much less where he resides in another jurisdiction. That these notes, under the statutes of New Jersey regulating proceedings in attachment, are to be regarded as choses in action, and not goods and chattels, is, we think, clearly to be inferred from the language of those statutes; and, if we understand the provision of the statute, choses in action are to be assigned to the plaintiff and creditors proving their claims, and are not to be sold as goods and chattels. It also appears that choses in action, when so assigned, do not constitute a payment, but "the moneys which may be received by virtue of such assignment shall operate as payment." If this view of the statutes of New Jersey be correct, the sale of the notes by the auditors was unauthorized and void; and it will be observed that this sale never received judicial sanction, the record showing no action of the court confirming the sale and distribution made by the auditors.

These considerations bear upon another branch of the case, the counterclaim of the defendant Miller, in which he insists that he is entitled to a credit for the amount applied to the payment of the debts of the plaintiff, under the proceedings in New Jersey. If, under the construction of the statutes of New Jersey, we have suggested the sale of the notes was unauthorized and void, no right can be founded upon that transaction, and the claims against the plaintiff exist to their full extent. If the plaintiff should be sued upon those claims, he could not rely upon an unauthorized and void transaction as a payment or satisfaction. That they were so void might be shown as well by those prosecuting their claims against the plaintiff as by the plaintiff himself: *Rangely v. Webster*, 11 N. H. 299, 306. Had property of the plaintiff, in fact being in New Jersey, been taken and appropriated to the payment of his debts, by a proceeding which only in another jurisdiction would be regarded as invalid, this might be deemed a satisfaction: *Id.* 309. But such a result cannot be claimed where the proceeding is void in the place where it is had.

It necessarily follows from the view we have taken of the proceedings in attachment that they not only do not affect the property of the plaintiff in this state, but in no manner bind him personally. The record of those proceedings, therefore, constitutes no evidence of any indebtedness due from the plaintiff to persons in New Jersey. He would be at full liberty,

before he could be charged with those claims, to contest their validity and amount. We do not think he can be called upon to enter into such a contest in this case with the defendant Miller. It cannot be pretended that the defendant, or any of the parties under whom he claims, were authorized by the plaintiff, either expressly or by implication, to pay his debts. The defendant, therefore, could only claim as being subrogated to the part of the several claims of which the supposed payment has been made. Now, there would be an insuperable difficulty in allowing him to sue the plaintiff for a fractional part of twenty different claims.

The act for the protection of purchasers at judicial and tax sales, on which the defendant relies in his answer, has, we think, no application to this case. That act, so far as it affects judicial sales, supposes that the plaintiff or the defendant has title to the property, and that it is liable for the debt due to the plaintiff, but from some defect in the proceedings the attempt to make it liable has failed. The defect here is not a defect in the proceedings, which are all regular enough, but a defect in the title of all the parties to those proceedings, as against the plaintiff in this action.

In every view we can take of the counterclaim of the defendant, we see no ground upon which it can be sustained. A judgment will be rendered finding that the notes given to the plaintiff by Carmichael and Wiley are due and unpaid; that they are secured by a mortgage on the premises; and unless the amount due shall be paid, the mortgaged premises shall be sold. In view of the circumstances of the case, a longer time than usual will be allowed before an order of sale is to be issued. The time will be six months. And we shall also order that each party pay his own costs.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and PECK, JJ., concurred.

LAW OF DOMICILE GOVERNS VOLUNTARY TRANSFER AND SUCCESSION TO PERSONAL PROPERTY: *McCune's Devises v. House*, 31 Am. Dec. 438; *Fletcher's Adm'r v. Sanders*, 32 Id. 96; *Freud. v. Hall*, Id. 341; *McCullum v. Smith*, 33 Id. 147; *Gravillon v. Richard's Ex'r*, Id. 563; *Goodall v. Marshall*, 35 Id. 472; *Lowry v. Bradley*, 39 Id. 142; *Succession of Packwood*, 41 Id. 341; *Vroom v. Van Horne*, 42 Id. 94; *Atchison's Heirs v. Lindsey*, 43 Id. 153; *Montgomery v. Milliken*, Id. 507; *Richardson v. Leavitt*, 45 Id. 90; *Mahorney v. Hooe*, 48 Id. 706; *Weatherby v. Covington*, 49 Id. 623; *Speed v. May*, 55 Id. 640; *Lawrence v. Kitteredge*, 56 Id. 385; *Smith v. Eaton*, 58 Id. 746; *Hairston v. Hairston*, 61 Id. 530; *Wheeler v. Hollis*, 70 Id. 363, and notes thereto.

WESTFALL v. BRALEY.

[10 OHIO STATE, 183.]

DEBTOR MUST BEAR LOSS WHEN HE MAKES PAYMENT IN BILLS OF SUSPENDED BANK, although the suspension was not known at the place of payment, nor to either of the parties, if the creditor offers to return the bills without unreasonable delay.

AMICABLE action. The petition alleged that the defendant, being indebted to the plaintiffs, delivered to them in payment bills of a bank in Kentucky; that the bank on the preceding day had suspended, but that this fact was unknown at the place of payment, and to both of the parties; and that as soon as the suspension became known, the plaintiffs offered to return the bills, and demanded payment, which the defendant refused. The defendant demurred to the petition, and the question thus raised was reserved for the decision of the supreme court.

Levi Dungan and William T. McClintick, for the plaintiffs.

H. S. Bundy, for the defendant.

By Court, SCOTT, J. The allegations of this petition are, in some respects, not as definite and specific as they should be, and perhaps, upon motion, they might be required to be made more so.

But regarding the petition as formally sufficient, it shows that certain bank notes were transferred by the defendant to the plaintiffs in payment of a pre-existing debt; that at the time of such payment, the bank which issued the notes had in fact stopped payment, although its failure was not then known at the place of payment, nor to either of the parties; and that the plaintiffs, upon learning the failure of the bank, without unreasonable delay, offered to return the notes to the defendant; and the question raised by the demurrer is, whether, under these circumstances, the loss falls upon the plaintiffs or upon the defendant.

This question does not appear to have been settled by any decision of this court, or of the former supreme court in bank; though conflicting decisions of the question seem to have been made by that court upon the circuit. There is also a want of harmony in the decisions of the several states upon the subject.

In Pennsylvania, it has been held that such a payment is valid, and that the loss must be borne by the party receiving the bills: *Bayard v. Shunk*, 1 Watts & S. 92 [37 Am. Dec. 441].

The same rule seems to prevail in Alabama and Tennessee: *Lowrey v. Murrell*, 2 Port. 280 [27 Am. Dec. 651]; *Scruggs v. Gass*, 8 Yerg. 175 [29 Am. Dec. 114]; and was also approved, *ibiter*, in *Young v. Adams*, 6 Mass. 182.

On the other hand, it has been held in New York that the loss in such a case must fall on the party making the payment: *Lightbody v. Ontario Bank*, 11 Wend. 1, affirmed upon error, 13 Id. 107. And such is the rule in Vermont, New Hampshire, Maine, and South Carolina: *Wainwright v. Webster*, 11 Vt. 576 [34 Am. Dec. 707]; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88; *Harley v. Thornton*, 2 Hill (S. C.), 509, note.

As to the opinion of the elementary writers on this question, it is said by Mr. Chitty: "It should seem that if, on discounting a bill or note, the promissory note of country bankers be delivered after they have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounters, because it must be implied that, at the time of the transfer, the notes were capable of being received if duly presented for payment:" Ch. Bills, 247. And Mr. Story, after stating the very question now under consideration, says that the weight of reasoning and of authority seems to favor the doctrine that the loss must be borne by the party transferring, and not by him who receives the bills: Story on Promissory Notes, p. 123, sec. 119.

Such, we think, is the correct doctrine, though it must be admitted that plausible, if not forcible, reasons may be suggested against it. Bank notes are the representative of money, and circulate as such, only by the general consent and usage of the community. But this consent and usage are based upon the convertibility of such notes into coin, at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the ordinary attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed, and its inability to redeem its bills is openly avowed, they instantly lose the character of money, their circulation as currency ceases with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place, the loss must necessarily fall upon him who is the owner of them at the

time; and this, too, whether he is aware or unaware of the fact. His ignorance of the fact can give him no right to throw the loss, which he has already incurred, upon an innocent third party.

In the absence of any special agreement, the very offer of bank notes, as a payment in money of a pre-existing debt, is a representation that such notes are what they purport to be, the representative of money, and that they have the quality of convertibility, upon which their currency as money depends. It is only upon this idea that they can be honestly tendered as money, and when accepted as such, under the same supposition, the mutual mistake of facts should no more be permitted to benefit one party, or prejudice the other, than if the notes had been spurious, or the payment had been made in base or adulterated coin. That money paid under a mistake of facts may be recovered back, is a familiar principle, and the application of the same equitable rule must be permitted to correct the mutual mistake of the parties in a case like the present. Besides, a contrary doctrine would present temptations, and afford facilities for the practice of fraud and imposition. A party might fraudulently pass the paper of a broken bank, and yet it might be difficult to prove his knowledge of the previous failure. Or if his victim should succeed in passing it to one equally ignorant of the facts with himself, the last recipient would be left to bear the loss, and the fraud be crowned with success.

We think justice and sound policy require the demurrer to be overruled, which is accordingly done, and the cause remanded, with leave to answer.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

PAYMENT IN BILLS OF INSOLVENT BANK, EFFECT OF: See *Ontario Bank v. Lightbody*, 27 Am. Dec. 179, and note, in which the question is discussed; *Lourey v. Murrell*, Id. 651; *Corbit v. Bank of Smyrna*, 30 Id. 635; *Gilman v. Peck*, 34 Id. 702; *Wainwright v. Webster*, Id. 707; *Bayard v. Skunk*, 37 Id. 441, and note; *Frontier Bank v. Morse*, 38 Id. 284.

CHILDS v. CHILDS.

[10 OHIO STATE, 382.]

POWER OF SALE IN MORTGAGE GIVES SIMPLY EXPRESS PERMISSION TO SELL IN FORECLOSURE PROCEEDINGS, which permission would have been implied, where it authorizes the mortgagee to sell "at public auction, according to the act in such cases made and provided," and the act directs that the proceedings to subject mortgaged premises to sale shall be conducted according to the known usages of courts of equity.

FORECLOSURE AND SALE OF MORTGAGED PREMISES DO NOT AFFECT RIGHT OF REDEMPTION of the grantee of the mortgagor, who was not made a party to the proceedings.

SALE ON FORECLOSURE OF MORTGAGE IS NOT VOID, but passes all the mortgagee's rights and interests to the purchaser, where the proceedings are instituted by the mortgagee against the mortgagor alone, after the mortgagor has conveyed away the equity of redemption.

MORTGAGOR'S GRANTEE ON REDEMPTION MUST PAY AMOUNT DUE ON MORTGAGE DEBT, although the mortgagor has obtained a certificate of discharge in bankruptcy. The certificate only discharges the mortgagor from personal liability upon the debt.

PURCHASER AT FORECLOSURE SALE IS SUBROGATED TO RIGHTS OF MORTGAGEE to the amount of the purchase-money so paid by him, and is entitled, on redemption, to receive the same with interest.

PURCHASER AT FORECLOSURE SALE MUST ACCOUNT TO HOLDER OF EQUITY OF REDEMPTION for rents and profits received by him while in possession of the mortgaged premises, and is entitled to a credit for improvements made and taxes paid by him.

ACTION to redeem. The defendant, Samuel R. Childs, purchased the land in controversy in March, 1836, for the use of his brother Horace, who shortly afterwards went into possession. In April, 1837, Samuel R. executed a mortgage of the land to John S. Wolcott, to secure payment of a bond due in three years, and in September of the same year, he conveyed the land in fee, but really intended to be in trust for Horace, to the plaintiff, his brother, Edward Childs, and the deed was duly recorded. Horace died in 1841, leaving his widow and children in possession of the farm. In 1842, Wolcott foreclosed his mortgage, making only Samuel R. and his wife parties to the bill, and the land was thereafter sold under the decree for one thousand six hundred and ninety-four dollars and twenty-five cents to T. D. Parish, in trust for Wolcott. Parish received the sheriff's deed, and conveyed the land for the same price to the defendant Johnson, who went into possession. Johnson, in turn, conveyed a portion to one Gray. In November, 1843, Samuel R. obtained a certificate of discharge in bankruptcy. About the same time Wolcott died, having bequeathed by his will all his right to the debt upon

the bond and mortgage to one Sarah W. Gibbs, who, in 1853, assigned the bond and gave a deed of release of the land to the plaintiff. The questions between the parties are fully stated in the opinion.

W. F. Stone and S. Minor, for the plaintiff.

E. B. Sadler, for the defendants.

By Court, SUTLIFF, J. The principal matter in difference between the parties in this case arises in relation to the effort of the proceedings had in 1842, for foreclosure under Wolcott's mortgage, and the sale of the premises upon the decree entered in that case.

It is insisted by counsel for defendants that those proceedings, and the sale therein, constituted a legal bar to any claim by complainant in the premises.

Upon the other hand, it is claimed by counsel of complainant that, not having been a party to those proceedings, he is not affected thereby; and that the pretended sale of the premises as to his right of redemption is void.

It is also insisted on the part of the defendants that the validity of the sale can be sustained by virtue of a clause in the mortgage, which provides that upon the mortgagor, Samuel R. Childs, failing to perform the condition of the mortgage by payment to Wolcott, the party of the second part, "from thenceforth it shall be lawful for the said party of the second part, his executors, administrators, and assigns, to enter into and upon all and singular the premises hereby granted, and intended to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said parties of the first part, their heirs, executors, and administrators, and assigns therein, at public auction, according to the act in such case made and provided," and authorizes Wolcott, or his attorney, to give to the purchaser a "good and sufficient deed of conveyance for the same in fee-simple."

It is true that conveyances may be made in this state by private sale in such cases under a power of attorney; but the power must in all such cases be strictly followed. The provision relied upon in this case is only to sell "at public auction, according to the act in such case made and provided." If, then, we recur to the act of this state made and provided for the sale of mortgaged premises at public auction, we shall find the extent of the power to sell thereby given. The act directing the mode of proceeding in chancery, passed March 14, 1831,

was the only act then in force directing the mode of proceeding to subject mortgaged premises to sale in such cases. It is provided by section 3 of that act that the proceedings in such cases shall be conducted according to the known usages of courts of equity. Such usages, however, required the party holding the equity of redemption, as did the complainant at that time, to be made a party, in order to enable such equity to be subjected to a judicial sale. He not being a party, the equity of redemption so held by him cannot be affected by the decree or sale. It is apparent, therefore, that this provision in the mortgage deed in no way affects the merits of the case. It only amounts to an express permission in the mortgage for the mortgagee to sell, in a proceeding of foreclosure, in case the condition of the mortgage should become broken. But this permission would have been implied, if not expressed; and the right of the mortgagee to such proceedings and sale would have been alike perfect in either case.

Inasmuch, therefore, as neither the complainant, Edward Childs, nor the beneficiaries for whom he held the lands, were parties to the proceedings in foreclosure on the part of Wolcott, under which the lands were exposed to sale, their interests remained unaffected by such proceedings.

How, then, stands the title upon the record?

It is agreed by all parties in interest that Samuel R. Childs held the fee of the lands, and first executed a mortgage thereon to John S. Wolcott, and then conveyed the lands to Edward Childs, in fee-simple, in 1837—Horace Childs all the time having remained in possession and improved the lands; but neither himself nor Edward Childs being a party to the proceedings under which the sale was had.

It is a general rule that a decree in chancery shall, like a verdict and judgment at law, only affect parties thereto; and that it shall not conclude nor in any wise prejudice those who are not parties. It is also a rule in this state that a decree in chancery, and a judicial sale under it of the subject-matter of the action, where the court has jurisdiction of the parties and thing, are conclusive on such parties, and pass their title to the purchaser. For, although this last proposition was denied in the case of *Watson v. Spence*, 20 Wend. 260, on the ground that the sale was utterly void, as to a subsequent mortgagee not a party, and so no privity of estate between him and the purchaser, yet such is not the doctrine in this state. Ever since the case of *Frische v. Kramer*, 16 Ohio, 125 [47 Am. Dec.

368], it has been regarded as the settled law of this state that the purchaser at a judicial sale in such case acquires the title of the mortgagee. The sheriff's deed executed to the purchaser by order of court in such cases, in the language of the statute, vests "in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when said lands became liable" under such decree.

It is true that the debt is regarded in this state as the subject-matter, and the mortgage as only its incident; yet as between the parties to the mortgage, after condition broken, the legal estate is absolute in the mortgagee, and the mortgagor has remaining only an equitable right of redemption, on paying the debt. The mortgagee in such case has a legal title, upon which he may recover and hold the possession of the lands, subject only to the right of the mortgagor to redeem on performing the condition of the mortgage.

In the case before us, the estate of the mortgagee, Wolcott, having then become absolute, entitling him to the possession of the lands, was sold and conveyed by sheriff's deed, under the decree and order of court, to Parish; but the equity of redemption had before been conveyed to Edward Childs, and remained in his hands unaffected by the sale. Parish, by the sheriff's deed, was invested with the same right to enter and occupy the land which the mortgagee had prior to the sale, after the condition of the mortgage had become broken. The deed of conveyance from Parish to Johnson invested the latter with the same title, and likewise, in equity, gave him the right to such part of the amount so due upon the mortgage from the party holding the right of redemption as had been paid for the title acquired at the judicial sale by the purchaser. And by entering into possession under such title so acquired under the judicial sale, the party would be liable to account for rents and profits to the party who held the right of redemption. The party so holding the right of redemption would therefore, as we have seen, remain unaffected by the sale.

The certificate of discharge, obtained by Samuel R. Childs, the mortgagor, under the bankrupt act, only discharged the debtor from personal liability upon the debt expressed by the bond or decree. The act itself provides, in section 4, "that no discharge of any bankrupt under the act shall release or discharge any person who may be liable for the same debt, as a partner, joint contractor, indorser, surety, or otherwise for or

with the bankrupt." At the time the mortgagor made his application for such discharge, the fee of the land had already become vested, under the mortgage deed, by condition broken, in Wolcott. And in law, as between the mortgagor and mortgagee and his grantee, the latter held the fee of the land. Edward, the grantee of the mortgagor, only held the right, in equity, of redemption; that is, the right upon doing equity to apply to a court of equity to relieve him against the superior legal right of the mortgagee. The mortgagee then held the legal title; and he must have continued to hold it, unless the plaintiff could be relieved in equity. But he could only be relieved by conforming to the rule that "he who asks equity must do equity." Wolcott, the mortgagee, held a complete legal title, by virtue of the mortgage and condition broken; subject nevertheless to Edward's right, on fully performing the condition, in a reasonable time after the time limited, to obtain a decree in a court of equity for a reconveyance of the title from the mortgagee. And such has been the holding of the courts as to the effect of a discharge, under the bankrupt act, of the mortgagor, in like cases: *Stewart v. Anderson*, 10 Ala. 504; *Stedman v. Gassett*, 18 Vt. 346, *et passim*.

Such, then, is the situation of the title, as shown by the record before us.

What, then, were the rights of the complainant? They were evidently the same that they would have been if no judicial sale had been made, or attempted, in relation to the premises. In that case the complainant, holding the right of redemption, would have had the right to redeem the lands by paying the amount due on the bond mentioned in the condition of the mortgage. Of the mortgage debt so due, the judicial sale, as before remarked, operated to transfer the amount of the purchase-price to the purchaser of the estate of the mortgagee. Or the purchaser at sheriff's sale may be regarded as, in equity, entitled to be subrogated to the place and rights of the mortgagee *pro tanto* for the amount so paid to the mortgagee upon the mortgage debt. The sum of one thousand six hundred and ninety-four dollars and twenty-five cents, and interest from the time of the payment, is therefore due to Johnson under the mortgage. The residue of the mortgage debt was, at the commencement of the suit, due the holder of the bond mentioned in the mortgage. But the proof under the supplemental petition shows that since the commencement of the suit that amount has been canceled or satisfied by an

assignment of the bond and a deed of release of the lands by the holder to Edward Childs, as trustee for the heirs of Horace Childs.

The complainant, was, therefore, entitled to redeem the lands, by paying the amount equitably due to Johnson, or his representatives, upon an account to be taken with them in the premises. In stating the account between the parties, the complainant should be charged with the amount so paid by Johnson, and all valuable and permanent improvements made, and taxes paid upon the lands, and credited with the yearly rents. The net rents and profits should be yearly applied, first in payment of interest, and then in payment of principal.

We think the record and proof before us show the plaintiff entitled to such ruling as thus indicated, and that the district court erred in refusing it.

The decree of the district court must therefore be reversed, and a decree entered as above expressed, and the case remanded for an account and final execution.

BRINKERHOFF, C. J., and SCOTT, PECK, and GHOLSON, JJ., concurred.

FORECLOSURE AND SALE OF MORTGAGED PREMISES DO NOT AFFECT RIGHT OF REDEMPTION of the grantee of the mortgagor, who was not made a party to the proceedings: *Frische v. Kramer's Lessee*, 47 Am. Dec. 368; *Bradley v. Snyder*, 58 Id. 564; and see *Moore v. Anders*, 60 Id. 551; *Whitney v. Higgins*, 70 Id. 748; *Clark v. Reyburn*, 8 Wall. 321, citing the principal case; and the rights of lien-holders, who are not made parties to the foreclosure, remain unaffected: *Stewart v. Johnson*, 30 Ohio St. 30, also citing the principal case.

SALE ON FORECLOSURE PASSES MORTGAGOR'S INTERESTS TO PURCHASER, who is subrogated to the mortgagee's rights: *Frische v. Kramer's Lessee*, 47 Am. Dec. 368; and see *Stout v. Keyes*, 43 Id. 465. See the principal case cited on this point in *Clark v. Reyburn*, 8 Wall. 321.

GRANTEE OF EQUITY OF REDEMPTION, HOW MUCH MUST PAY TO REDEEM AFTER FORECLOSURE: See *Bradley v. Snyder*, 58 Am. Dec. 564; and see *Merritt v. Hosmer*, 71 Id. 713, and note.

PURCHASER AT FORECLOSURE SALE, LIABILITIES AND RIGHTS OF AS TO RENTS AND PROFITS AND IMPROVEMENTS: See *Bradley v. Snyder*, 58 Am. Dec. 564; *Littell v. Zunta*, 36 Id. 415; *Astor v. Turner*, 43 Id. 766, and note. As to the liabilities of a mortgagee in possession for rents and profits, and his rights to improvements, see *Benham v. Rowe*, 56 Id. 342, and note collecting prior cases; *Harrison v. Wyse*, 63 Id. 151.

THE PRINCIPAL CASE IS CITED IN *Sealing v. Lawrence*, 27 Ohio St. 448, per Wright, J., dissenting, to the point that the rule that applies to tax sales, and to all sales under powers other than those of courts of law, is that the proceedings must be strictly regular.

COE v. COLUMBUS, PIQUA, AND INDIANA R. R. Co.

[10 OHIO STATE, 372.]

CORPORATION'S POWER TO ACQUIRE AND DISPOSE OF PROPERTY HAS RESTRICTION in the object of the corporation, or in the nature of the property.

CORPORATION'S RIGHT TO ALIENATE PROPERTY, AND CREDITOR'S POWER TO SUBJECT IT TO DEBTS, stand upon the same footing, in the absence of some statutory exemption.

RAILROAD CORPORATION IS NOT AUTHORIZED TO SELL PROPERTY which, from its nature, it could not alienate, by a statute providing that "the real and personal property of corporations shall be liable to execution as other property."

RAILROAD CORPORATION IS NOT AUTHORIZED TO CONVEY ALL PROPERTY WHICH IT MAY ACQUIRE by a statute which empowers it to "acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation."

RAILROAD CORPORATION CANNOT ALIENATE FRANCHISE TO BE CORPORATION, or to construct and maintain a railroad, and receive compensation for the transportation of persons or property.

RAILROAD CORPORATION CANNOT ALIENATE REAL PROPERTY acquired and held for the exclusive purpose of the exercise of a franchise which cannot be alienated; as the franchise to be a corporation.

RAILROAD CORPORATION MAY ALIENATE THINGS REQUISITE FOR ITS USE, after the road is constructed and prepared for use, which cannot be regarded as constituting a part of the real estate, but as personal property; such as locomotives, cars, and the like; and such property is liable to execution for its debts.

FRANCHISE TO BE CORPORATION, AND THAT TO CONSTRUCT, MAINTAIN, AND OPERATE RAILROAD, ARE DIVISIBLE as regards alienation by the corporation, however they may be for other purposes; and the fact that corporations only, under the law, can exercise the power of eminent domain, which cannot be the subject of grant or sale, is no objection to the transfer to individuals of the latter franchise, if it otherwise appears to be authorized by the legislature.

RAILROAD CORPORATION IS NOT AUTHORIZED TO PLEDGE OR MORTGAGE the franchise of being a corporation, but may pledge or mortgage the franchise to maintain and operate its road, and its property, whether real or personal, to be subsequently acquired, under statutes empowering it to borrow money and to execute its bonds therefor, and to "pledge, by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof."

RAILROAD CORPORATION'S GENERAL POWERS TO PLEDGE OR MORTGAGE AFTER-ACQUIRED PROPERTY are no greater than those of an individual.

RAILROAD CORPORATION MAY MAKE INTEREST ON BONDS PAYABLE SEMI-ANNUALLY, where it is authorized to borrow money "at a rate of interest not exceeding seven per cent per annum," and the bonds shall be "payable at such time and places as shall be agreed on by the respective parties so contracting."

RAILROAD CORPORATION MAY SELL BONDS AT DISCOUNT OR EXCHANGE THEM for iron rails, and its mortgages securing them are not rendered

invalid thereby, where it is authorized to borrow money and execute its bonds therefor, and secure the same by pledge or mortgage, and it is provided that the directors might sell or negotiate the bonds at such rates as they should deem best to advance the interest of the company; and such sale should be as valid in every respect as if sold at their par value.

RAILROAD CORPORATION'S PERSONAL PROPERTY IS NOT EXEMPTED from the operation of liens or claims created by its own acts or resulting from judicial proceedings, from the fact that it has executed a mortgage, under authority, of its franchises and its real and personal property.

LEVY OF EXECUTION ON PROPERTY IN HANDS OF RECEIVER MAY BE ORDERED WITHDRAWN, and the sheriff compelled to answer to the court for contempt in making it. *Per Gholson, J.*

MORTGAGE DEFECTIVELY EXECUTED WILL BE REGARDED IN EQUITY AS CONTRACT TO GIVE MORTGAGE, which the court may direct to be perfected.

MORTGAGE DEFECTIVELY EXECUTED WILL BE PREFERRED TO CLAIMS OF EXECUTION CREDITOR, especially when the levy was made after the property was in the hands of a receiver.

CREDITOR OF RAILROAD HAS NO EQUITABLE CLAIM SUPERIOR TO MORTGAGES, from the fact that the consideration of his debt was for moneys advanced in payment of interest and taxes, and for right of way.

SUBSEQUENT MORTGAGE HAS NO PRIORITY OVER PREVIOUS MORTGAGE DEFECTIVELY EXECUTED to which it was expressly made subject.

MODE OF SALE OF PROPERTY AND FRANCHISES UNDER MORTGAGE GIVEN BY RAILROAD CORPORATION, and the rights of mortgagees, bond-holders, and creditors thereunder stated.

INJUNCTION WILL NOT BE GRANTED TO RESTRAIN RAILROAD CORPORATION from the use of its track constructed upon the lands of the complainant, under an agreement whereby the company was allowed to enter upon the complainant's lands and construct its road thereon, and upon failure of the company to make payment for the use of the land within a certain time after an award was made, the license of the company should cease, and any interest of the company under the agreement, and its fixtures and works, should become the property of the complainant.

ACTION by George S. Coe, trustee, against the Columbus, Piqua, and Indiana Railroad Company, and others, asking for a sale of the railroad and other property of the company conveyed to Coe in trust to secure the payment of certain bonds. The questions which arose in the case are fully stated in the opinion.

Hunter, Stanberry, and Vinton, for Coe.

Wilcox, for the company and others.

Wolcott, for Hilliard.

Ranney, Kennon, and Thurman, for the other defendants.

By Court, GHOLSON, J. The Columbus, Piqua, and Indiana Railroad Company was incorporated by a special act passed February 23, 1849, with a capital of two million dollars, and

was organized in February, 1850. By the act of incorporation it is provided that the directors of said company "shall be entitled to have and enjoy, and are hereby invested with, all the rights, privileges, powers, and franchises, and be subject to all the restrictions of the act regulating railroad companies passed February 11, 1848." The company was authorized to construct and maintain a railroad from Columbus, by Urbana, Piqua, and Greenville, to the west line of the state of Ohio. It was authorized to demand and receive for the transportation of passengers and property on its road a compensation not exceeding certain rates specified in the act.

By the first section of the act of 1848 it is provided:

"Sec. 1. That whenever any number of persons, not less than five, shall be named as corporators in any act of the general assembly, and authorized to construct a railroad, they and their associates, successors, and assigns, by the name and style provided in said act, shall thereafter be deemed a body corporate, with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation."

The company thus incorporated and organized proceeded to acquire rights of way to construct and equip its road. It was, at the time of the commencement of the action, in possession of its road and equipments, and was operating the same. The present controversy has arisen from the conflicting claims of creditors. Several of the questions which are presented require an inquiry into the general powers of the company to dispose of its property, and into the liability of that property to be subjected to the payment of its debts.

A corporation invested with a power to acquire and dispose of property so general and extensive as that contained in the section which has been quoted, can only be limited in regard to the purposes for which the property is acquired or disposed of, or from the nature of the property. It is stated in the elementary works that the mere grant, to be a body corporate, would give, in the absence of any restriction, the power to acquire and dispose of property: Grant on Corporations, 4. Some restriction, however, is generally found, either in the object of the corporation or in the nature of the property. When such a restriction does not apply, a corporation may very properly be regarded as occupying the position of an indi-

vidual owner. There would be the same right of voluntary alienation, and a like liability to involuntary alienation. What the company could convey, its creditors might subject. In the absence of some express legal exemption, "it is an inseparable incident to property, legal or equitable, that it should be liable to the debts of the owner, as it is to his alienation:" *Hough v. Cress*, 4 Jones Eq. 295-297. In this view, we must construe the provision of the statute, that "the real and personal property of corporations shall be liable to execution as other property:" Swan's Stat. 231.

That statute was not intended to authorize the sale of any property, which, from its nature, a corporation could not alienate and which an individual could not take by purchase from a corporation. It does not extend to what are denominated the franchises of the corporation. In the case of a railroad corporation, its franchises and corporate rights are not alienable, without express authority of law. Nor do we think the general language of the first section of the act of 1848, which confers the power to "acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation," is to be understood to authorize a railroad corporation to convey all the rights and interests in property which it may acquire. Like many other general words, they must be "restrained unto the fitness of the matter." When power is given to acquire an interest in real estate for the single and exclusive purpose of the exercise of a franchise, and particularly when, to acquire such interest, there is a delegation of the power of eminent domain, the interest cannot be separated from the use to which alone it can be applied, and if the franchise cannot be conveyed, neither can the interest in real estate with which it is connected: *Redfield on Railroads*, 128. But the principle does not necessarily apply to things brought on the land, in which such a limited interest has been acquired. How far these may be alienated by the corporation, or be subjected for its liabilities, will depend upon different considerations.

The corporation having acquired an interest in land for the construction of its road, in that construction affixes to the land certain things—the timber and iron for the track, the stone and timber for bridges and culverts. It also erects depots, and structures for a supply of water. The road is not regarded as constructed and prepared for use until such things are affixed. But when the road is thus constructed and ready for

use, other things are requisite for that use—locomotives, cars, and other articles and materials, some of which are consumed in the use, and the supply has to be, from time to time, renewed. Now, we think there is a manifest distinction between the road as constructed for use, and the various things employed in that use, and that the latter cannot, with propriety, be regarded as constituting a part of the real estate, but are the personal property of the corporation.

We are not called upon in this case to decide what, in the event of a determination of the use for which interest in real estate was obtained, would be the respective rights of the owners of the real estate, and the creditors of the corporation, in those things affixed in the construction of the road, and which might be separated from the land, and would have a value when so separated. We are not called upon to decide whether either such owners or the state could object to such a separation for the purpose of paying the just debts of the corporation. When those questions arise, it may be necessary to determine whether the rule as to fixtures, between vendor and vendee, or landlord and tenant, can be justly and equitably applied. But we have no hesitation in coming to the conclusion that what we have described as the personal property of the corporation, employed in the use of its road and franchise, is liable for the payment of its debts. We think the line can be clearly drawn between the interest in real estate and the franchise connected therewith, and the movable things employed in the use of the franchise.

The distinction appears to us to be as plain as that between a farm and the implements and stock which the proper use of the farm necessarily requires. There are instances which may be put still more analogous. Take, for example, a ferry franchise. It is connected with real estate; it is itself an incorporeal hereditament, and therefore real estate. The use of this franchise requires boats and other movable appliances. But these, when employed in the use of the ferry franchise, do not thereby become a part of the real estate; they are the personal property of the owner of the ferry franchise, or, it may be, of some person to whom the ferry franchise has been demised for a term of years.

Considerations of public policy and convenience have been pressed upon our attention in connection with the question under examination. It may be true that a railroad corporation holds its property, in a certain sense, as a public trust—

to answer the purposes of a public highway, the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involves obligations to individuals, and to meet those obligations, the property of the corporation must in some form be liable. The question is, In what form? Shall it be in the ordinary legal form applicable to the property of individuals? or shall peculiar rules be introduced, which may have the effect to delay creditors, and operate as a shield to protect property from their just demands?

We have been told that the sequestration of the tolls of a turnpike company furnishes an analogy which may be properly followed. It is necessary to guard against a very common error of acting on that which affords an argument by analogy, as if the resemblance in some particulars constituted an identity in all: *Hooper v. Lane*, 6 H. L. Cas. 443-549. The analogy is very imperfect between the tolls exacted for the use of a turnpike, and the compensation charged by a railroad company for the transportation of persons and property. The right to exact the one and the earning of the other involve very different duties and responsibilities. To place persons in toll-houses to collect tolls for the use of a turnpike, and to place a person or persons in the charge of a railroad with all the various appliances necessary for the transportation of persons and property, are certainly very different matters. The one is the simple appointment of agents to receive money, and perhaps to expend a part of that money in the repair of a highway for ordinary travel; the other is a business requiring the use of property of various kinds, and the employment of persons of varied skill and capacity to be exercised not only in management and supervision, but in particular details—a business requiring those having it in charge to enter into contracts and incur obligations which concern numerous individuals and affect the safety of their persons and property.

A court of equity, as a temporary measure, during the pendency of a litigation, for the preservation of property and to prevent its waste and destruction, might undertake, by means of a receiver, such a business. And it may be that the circumstances of a case might present such equitable considerations arising from an unforeseen disaster, or from other cause which we need not conjecture, that a court of equity might be justified in staying the hand of a creditor asserting his legal rights in some form consistent with his ultimate security, so

as to prevent, for a limited period, the separation of the personal from the real property of a railroad company, and the cessation of its business. But that as an ordinary measure of relief for an indefinite period, and for the purpose of earning money, the business of operating a railroad may be undertaken by a court of justice, is a proposition which we think cannot be maintained. It would, we think, be a departure from the proper and ordinary functions of a court of justice, and be attended with intolerable mischief and inconvenience. And this alone is a sufficient reason against the adoption of any principle upon the ground of analogy: *Wild v. Hobson*, 2 Ves. & B. 105-113.

If we are at liberty to suggest, on what the legislature very probably relied for the continued operation of a railroad once constructed, we should say it was the interest of its owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation, so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the expense and risk of the state—the prudence of such a course could find few or no advocates. We are satisfied that it is not the policy of the state, nor just to individuals, that the power of a court should be invoked to enable an insolvent corporation to operate a railroad by protecting its property from the claims of creditors—of those who have performed for it labor, or have suffered losses or sustained injuries by the misconduct of its agents. We think that the true policy of the state requires that just demands should be met, and that the property of those against whom they exist should be applied for the purpose.

The views we have expressed are sustained by decisions in other states. In a case decided in Illinois it is said: "This road and the furniture do not constitute one entire estate, either real or personal. The furniture is personal property, and constituted no part of the road, which is real property. It is no more a part of the road than is the furniture of a house a part of the house. A house and its furniture may be sold or leased together, but that does not change the character of the property of either. It may be true, as was said upon the argument, that the road would be of little value without rolling stock, and that the latter would be equally useless without the former. Their dependence on each other does not prove that

both constitute but one thing. The furniture of a road may be removed from it and used elsewhere without injury to or impairing the value of the road itself." *Sangamon and Morgan R. R. Co. v. County of Morgan*, 14 Ill. 163-166 [56 Am. Dec. 497].

In the case of *Pierce v. Emery*, 32 N. H. 484-508, it is said of a railroad company: "They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise. . . . They may contract debts; may purchase on credit; and we see nothing in the nature of their business, or in their relations to the public, which should prevent them from making a valid mortgage of their personal property not affixed to the road, though used in the operation of it." Id. 504. And in that case, mortgages on the furniture and equipments of the road were sustained as valid. "But," it was said, "the complainants have no right in the road by virtue of those mortgages; they must assert their security by taking the property away, as in the case of a mortgage by an individual:" Id.

In a case in Connecticut, involving the question of the application of an insolvent law to a railroad corporation, it was claimed that railroad corporations were excluded from its operation upon grounds of public policy and convenience, such as have been urged in this case. But the court said: "The reasons urged for distinguishing between railroad companies and other private business corporations do not strike us with any considerable force, while justice obviously requires that the creditors of that particular class of corporations should have the same protection for their debts as is provided for the creditors of other similar corporations. So far as the railroad company itself is concerned, it is entitled to no special immunity in this respect as to its creditors; and as to any inconvenience to the public by temporary or permanent cessation of its business, consequent upon proceedings in insolvency against them, the necessity of which cessation, however, is not apparent to us, such inconvenience would be the same in kind, and would differ only in degree from that which would attend similar proceedings against any other private corporations which have been mentioned; and would be the same only as if their business were conducted by natural persons who had become insolvent, and therefore liable to those proceedings. The appellants further insist that railroad companies were not

intended to be embraced by the insolvent law, on the ground that the trustee appointed under it would not be invested with the power of selling, leasing, or operating the railroad, and therefore, that the most valuable portion of its property would not be made available for the payment of its debts. We do not deem it necessary to express any opinion on the legal principle affirmed in this objection; for if it is correct, it falls far short of sustaining the inference claimed from it. That some of the property of the company is of such a peculiar character that the trustee could not, by his own unassisted power, dispose of or manage it for the benefit of creditors, would be an insufficient ground for concluding that the legislature did not intend that they should have the benefit of such of its property as he could appropriate to their use. And we would add, in regard to other property, if there should be any in which the company would have a valuable interest, without undertaking to prescribe the particular course to be taken with it, which would now be premature, we cannot but think that a method could be devised by which it could be made available to creditors." *Platt v. New York and Boston R. R. Co.*, 26 Conn. 544-573.

In a recent case in New Hampshire, the right of a creditor to levy upon the movable property of a railroad was directly involved, and the court held that "the locomotive engines and freight and passenger-cars of a railroad corporation are liable to attachment, when not in actual use, like other personal property." In that case, as in this, principles of public policy and convenience, and the public use, were brought forward in argument. But the reply of the court in conclusion was: "The property of individuals who owe duties to the public is not, for that reason, exempted from liabilities to this ordinary process of the law, except so long as it is in actual use in the discharge of that duty. Such is the case of the contractor to carry the mail. It has never been held that the steamboat, or coach and horses, used in the conveyance of the mail, were exempt when not in use. Considering, then, that it is not necessary, for the discharge of the public duties of these corporations, that they should be the owners of cars or engines—many such roads being operated by the cars of other corporations; that it is a matter of great uncertainty what articles of the personal property of such corporations are necessary for the discharge of their public duties; that no means exist by which it can be determined what is necessary, or otherwise; that it

must be very difficult for courts to lay down any definite rule by which officers can be guided, who in such cases must decide at their peril—it seems to be neither judicious nor expedient to establish an exemption of this kind, unless it is done by the direct action of the legislature, who can provide the proper rules and safeguards for the safety of officers as well as of parties.” *Boston, C. & M. Railroad v. Gilmore*, 37 N. H. 410-423 [72 Am. Dec. 336].

The order of our inquiry next calls for an examination into into the nature and character of the franchises of the corporation. It has been said, “the essence of a corporation consists in a capacity: 1. To have perpetual succession under a special name, and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name, as an individual; and 3. To receive and enjoy, in common, grants of privileges and immunities.” *Thomas v. Dakin*, 22 Wend. 71. Each of these applies to the corporation under consideration. Under the first two is described what may be termed the franchise of the corporators, or individual members of the corporation; and under the last, what may be termed the franchises of the corporation. As said in a recent case: “A corporation is itself a franchise, belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation.” *Pierce v. Emery*, 32 N. H. 484-507.

By the act incorporating the Columbus, Piqua, and Indiana Railroad Company, certain persons named as corporators, their associates, successors, and assigns, became a body corporate. This was the franchise of the corporators. By the same act, or the general law to which it referred, this body corporate received the franchise of constructing and maintaining a railroad. It may well be, that, for the purpose of a judicial proceeding to declare a dissolution of the corporation, these two franchises may be regarded as indivisible. And in this view it was said: “That the franchise of being a corporation for one general purpose, as to erect and make profit from a turnpike, to bank, insure, or the like, comes within the doctrine which denies that a franchise is divisible, would seem to be quite plain.” *People v. Bristol & R. Turnpike Co.*, 23 Wend. 222-243, Cowen, J. Indeed, it cannot be regarded as unreasonable to hold that the capacity to receive and enjoy the franchise of constructing a railroad, and making profit therefrom, being the only object and purpose of the grant of a capacity to be a cor-

poration, when the former is lost, it should be adjudged a dissolution of the corporation. But the reason upon which the indivisibility of a franchise proceeds, when a question of forfeiture arises, may not apply in other cases. It has no application when the question is as to the construction of an authority to dispose of the franchise which belongs to the corporation, as distinguished from that which appertains to the individual members. If the corporation is authorized to dispose of the franchise to maintain and make profit from a railroad, while a capacity to take from it this franchise, and the right to maintain the railroad and make profit from its use as such, would necessarily be given to the party to whom it might be disposed of under the authority, it would by no means follow that the further capacity to be a corporation would be conferred. The right to take the road, with the franchise of making profit from its use, might be implied from the authority to dispose, but the implication would be extended no further than was necessary. And here it may be observed that after an act of disposition, which separates the franchise to maintain a railroad and make profit from its use from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet until there be such judgment, the rights of the corporators, and of third persons, may require that the corporation be considered as still existing. When that judgment is had, those rights would be protected.

These views are strengthened by the consideration that, as to the transfer of the one franchise, there is a consistency and propriety arising from its nature and character that does not apply to the other. This distinction has been clearly pointed out in a recent case, in which it is said: "Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and when created, it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, save as its agents or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not neces-

sarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable." *Hall v. Sullivan Railroad Co.*, 22 Law Rep. 138-140; S. C., 1 Brun. Col. Cas. 613, Curtis, J. Very similar language is used in a recent case in Vermont: *Bank of Middlebury v. Edgerton*, 30 Vt. 182-190.

In this connection, it is proper to notice a power delegated to railroad corporations—that of taking land for the use of the road by a judicial proceeding instituted for the purpose. This proceeding is regulated by a general law, and can only be instituted by a corporation, there being no provision for a recourse to it by a private individual. This circumstance has been pressed as one having an important bearing on several of the questions in this case. The right to institute such a proceeding can, in no proper sense, be regarded as a franchise of the corporation. It is rather a means to secure the enjoyment of the franchise granted, a resort to which may become necessary. It usually is necessary to accomplish the object intended, and undoubtedly the faith of the legislature may be regarded as pledged, that some proper mode will be provided for the accomplishment of that object. But until the prescribed mode has been adopted and the land obtained, that which is to be done by the legislature, or the tribunals acting under its authority, can only be regarded as executory. There is no franchise—no grant or contract executed, such as a franchise has been held to be. When, by a resort to the mode authorized by law, the interest in the land has been obtained, then the power is executed, and the enjoyment of the franchise to that extent secured.

There is nothing in the nature of such a power which forbids its exercise by an individual when delegated for a purpose of a public nature. Instances of its exercise by individuals under the law of England, and of some of the states, are well known. We need only mention the proceeding by a writ of *ad quod damnum* to condemn land for the purpose of a mill. If, then, in any disposition of a railroad, and the franchise of making profit from its use, authorized by law, the ownership and control should pass into the hands of individual owners, and for any purpose of construction, or change of location, a resort to such a power becomes essential, such individual owners may safely look to the legislature for an extension of the provisions of the general law. They might justly say that if

they were authorized by law to acquire the road and the franchise of operating it for their own benefit, and for public use, the legislature would be bound in good faith to afford the usual and necessary means to render the grant made under its authority effectual for the purpose intended. In this respect, they would stand, in point of legal right, upon like footing as the original constructors of the road; neither having strictly the right which, as against the action of the legislature, could be enforced—one relying upon the faith of the legislature that the mode existing would be continued, and the other, that a proper mode would be adopted. We certainly cannot hold that such a delegation of the power of eminent domain can be made the subject of grant or of sale. But we do not regard this as any objection to the transfer, to individual owners, of the franchise of maintaining and operating a railroad, if it otherwise appears to be authorized by the legislature.

From observations upon the general powers of the corporation, and the nature and character of its rights and franchises, we proceed to a consideration of those special powers which the questions in this case involve. By the thirteenth section of the act of 1848, regulating railroad companies, it was provided: "Such company shall have power to borrow money on the credit of the corporation not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent per annum, and may execute bonds and promissory notes therefor, and to secure the payment thereof may pledge the property and income of such company." By the fourth section of an act to amend the charter of the Columbus, Piqua, and Indiana Railroad Company, passed March 12, 1851, it is enacted "that the directors of said company are hereby authorized to borrow, upon the credit of the same, any sum or sums of money which may be necessary to finish and furnish its road; and for said loan or loans, to make and execute in the name and on behalf of said corporation such bonds, promissory notes, or other evidences of debt, and payable at such time and places as shall be agreed on by the respective parties so contracting. And for the purpose of securing the payment of the money so borrowed, said directors may pledge, by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof, as far as the same can be done without prejudice to the previous and existing liens on the same."

We have to inquire how far those special provisions extended

the powers of the corporation in the disposition of its property, and, in the first place, whether they authorized the pledge or mortgage of its franchises, or any of them. In our opinion, in view of the remarks which have been before made, they did not authorize the pledge or mortgage of the franchise of being a corporation, which appertained to the corporators or individual members of the corporation. The provisions evidently have reference to the property of the corporation, and not to personal rights. No provision is made by which a transfer of the corporate existence can be effected. In the absence of such a provision, we know of no mode which we could adopt by analogy. To provide a mode would be legislative, not judicial, action.

The same objection does not apply to the franchise of the corporation to maintain its road and make profit from its use. That franchise is so far connected with the real estate of the corporation, that by and with a sale and transfer of the one, the other may well pass, if such appears to be the intention of the legislature. We have carefully considered the provisions which have been cited, and are of the opinion that it was the intention of the legislature to authorize a pledge or mortgage of the franchise of the corporation to maintain and operate its road. The corporation is authorized to pledge, not only its property—described in the special act as its “entire road, fixtures, and equipments, with all the appurtenances”—but also the “income and resources thereof.” To make this pledge an effectual and substantial security, such as was evidently contemplated and understood by those to whom it was offered, the right to use the property in the only mode by which it could produce an income is absolutely essential. Any other construction of the power would be manifestly unjust.

We have to inquire, in the next place, whether the provisions so extended the powers of the corporation as to authorize a pledge or mortgage of property not existing or not owned by the corporation at the time of the pledge or mortgage, but to be thereafter acquired. It is admitted that the general powers of the corporation, being in this respect no greater than those of an individual, would not authorize a legal pledge or mortgage of such property. In this state, under the construction of our registry laws, it is quite clear that a mortgage of lands to be afterward acquired, being a mere contract to convey such lands as a security, or, as it has been termed, an equitable mortgage, can have no validity against third persons

who acquire legal interests in or liens upon the property. "The legal rights of such persons cannot be displaced at the instance of the holder of a prior unrecorded mortgage, or contract for a mortgage, although acquired with notice of such mortgage or of the existence of such contract; the object of the law being to avoid all the vexed questions of notice, actual or constructive, in determining priorities of lien. So far as may be necessary to their protection, such a thing as an equitable mortgage is wholly unknown:" *Bloom v. Noggle*, 4 Ohio St. 45-54.

The act regulating the record of chattel mortgages does not, as to purchasers or subsequent mortgagees, admit of the same construction; as to them, the courts are left at liberty to say that, if they have notice, they are not to be preferred. As to creditors, a legal mortgage of goods and chattels not recorded, though there was notice of its existence, would be invalid. An equitable mortgage of like property, upon the principle applied in case of real estate, ought not to have any greater effect. But a mortgage of goods and chattels, whether in the form of a conveyance or of a contract to convey, and whether applying to property in possession or to be acquired, if possession be taken of the property conveyed or intended to be conveyed, would create a valid lien against creditors attempting to subject such property to their claims, after possession so taken: *Chapman v. Weimer*, 4 Ohio St. 481.

As to the transfer of a title, a mortgage of goods and chattels, to be subsequently acquired, would stand upon the same ground in law and in equity. It could give "no legal title, or any equitable title, to any specific goods:" *Congreve v. Evetts*, 10 Exch. 298, Parke, B. It would amount to no more than an executory contract; in equity it might be regarded as a claim for a title, to be perfected by possession taken with the assent of the grantor, or under his authority, or by a specific performance. It is well known that courts of equity do not ordinarily enforce contracts for the delivery of articles of personal property, but there are cases in which it has been done. They proceed upon the ground that there are peculiar circumstances showing that a legal remedy is inadequate. Now, we need not decide in this case whether a purchaser of personal property, with notice of a claim under contract, which there would be a right to have specifically enforced, would not be affected by that equity. No such question arises in this case, and we have said enough to meet any question that does arise, and also to show that the corporation, under its general powers,

could make no mortgage of subsequently acquired property that could operate as a substantial security, either at law or in equity. The claim upon such a security would be invalid, as to the real estate of the corporation, against both creditors and purchasers; as to its personal property, it would be invalid against creditors until possession was taken, and doubtful against purchasers.

There being, then, this defect in the general powers of the corporation, was it the intention of the legislature to relieve by a grant of special power? It is, we think, important to consider that, to give an effectual security for the advance of a large amount of money (and such an advance was clearly contemplated), power was required: 1. To pledge or mortgage the franchise of the corporation connected with its road; and 2. To pledge or mortgage the property which would necessarily be acquired in finishing and furnishing its road, and in its use, until the period for which credit was given should elapse. The very necessity for power in these two particulars furnishes strong ground to suppose that it was the object to grant such power. It is a rule in the construction of statutes, which are intended to furnish a remedy, or afford relief, to consider the extent of the remedy required, and the nature and character of the relief which the exigency of the case demands. The two particulars mentioned are closely connected, and both appear to be essential to the accomplishment of the object in view of the legislature. The same reasons which would apply to induce a grant of the one also apply with full force to the other. The language is equally applicable to both. The pledge is to be of the property and income. The income intended must have been the future income, and was to be produced by property in possession and to be acquired. If the future product can be conveyed, why not that by which it is created?

We have shown the general powers of the corporation as to the disposition of its property, in view of the creation of a security for money borrowed; and we have shown the particulars in which those powers were defective. If special power was conferred, looking expressly to the creation of such a security, it is fair to conclude that the intention must have been to authorize a better and more effectual security than the general powers of the corporation would allow. If any effect is given to that intention, or any practical and consistent operation to the language in which it is expressed, the two particu-

lurs which have been mentioned must be embraced. Such must have been the understanding of those concerned; such, we know, from the history of the time, and from documents in this case, was the understanding of those who offered and of those who received the pledge. That understanding is, we think, fully sustained by the construction of the authority under which it was acted upon; and good faith requires that the expectation thus created should not be disappointed.

Although the conclusion we have reached must depend upon the proper construction of statutes of this state, it is satisfactory to know that so often as a similar question has arisen upon similar statutes of other states, a like conclusion has been attained: *Pierce v. Emery*, 32 N. H. 484; *Phillips v. Winslow*, 18 B. Mon. 431 [68 Am. Dec. 729]; *Seymour v. Canandaigua and Niagara Falls R. R. Co.*, 25 Barb. 284-308.

Having ascertained what the corporation was authorized to pledge or mortgage, we have next to consider the acts done which are claimed to be an exercise of that authority. On the first day of November, 1851, the Columbus, Piqua, and Indiana Railroad Company executed a deed in trust or mortgage to George S. Coe, to secure the payment of six hundred bonds of one thousand dollars each, payable on the first day of January, 1862, and bearing interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January, commencing on the first of July, 1852. This mortgage purported to convey the property then held, and to be thereafter acquired, and all franchises, rights, and privileges of the company, of, in, to, or concerning the same. The description being sufficient to embrace any property, real or personal, and any rights or franchises connected with the property which the authority granted to the company would permit them to convey. This mortgage appears to have been duly executed and recorded. On the twenty-first day of July, 1852, another deed in trust or mortgage of the same purport was executed to the same party, being in confirmation of the former, and given and made to correct an error recited and set forth in the latter. This also appears to have been duly executed and recorded. The bonds mentioned and specified in the mortgages were made and negotiated by the company, and are outstanding in the hands of the holders thereof, and no interest has been paid since the first of July, 1855. It appears, by a recital in the mortgage, that one object of the loan, and the execution of the bonds to secure the payment thereof, was

the purchase of iron rails; and it also appears that two hundred and ninety-five of the bonds were used in the purchase of iron rails. On the first day of January, 1853, the company executed another deed in trust, or mortgage, to George S. Coe, to secure four hundred bonds of one thousand dollars each, payable on the first day of January, 1863, and bearing interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January, commencing on the first day of July, 1853. This mortgage has the same description of the property and rights intended to be conveyed as the first, and is made subject to the satisfaction of that mortgage. There is claimed to be a defect in the execution and acknowledgment of this mortgage. It was placed on record in the several counties, as required by law. The bonds mentioned and specified in this mortgage were made and negotiated by the company. On the first day of April, 1854, the company executed to Elias Fassett a deed in trust, or mortgage, to secure six hundred bonds of one thousand dollars each, payable on the first day of April, 1869, and bearing interest at the rate of seven per centum per annum, payable semi-annually on the first days of April and October, commencing on the first day of October, 1854. This mortgage describes in the same manner as the first and second, the property conveyed or intended to be conveyed, and is made subject to those two mortgages which are described as securing, in the aggregate, one million of dollars; and as being duly recorded in the counties through which the road passes. This mortgage appears to have been duly executed and recorded. The bonds mentioned and specified in this mortgage were made and negotiated by the company. But it appears that these bonds were sold by the company at less than fifty-one cents on the dollar; that only fifty-eight of the first-mortgage bonds were sold by the company at par, the residue being sold at from seventy-five to eighty-seven and one half cents on the dollar; and that the second-mortgage bonds were all sold by the company at from seventy-five to ninety cents on the dollar. All of said bonds are now in the hands of *bona fide* holders, and worth, in the market, much less than par, and have been so ever since their first sale by the company.

Several objections have been made to the validity of these bonds and mortgages, which we have now to consider. It is claimed that "the corporation has no power to contract for the payment of interest, either semi-annually or at any other time

before the money borrowed falls due." The two sections which have been before cited, authorizing the company to borrow money, it is argued, must be construed together, and that there is nothing in the latter which affects the limitation, as to the rate of interest contained in the former; the meaning of the two sections being, that "the company may borrow money, at a rate of interest not exceeding seven per cent per annum, and may give bonds therefor, payable at such times and places as the parties may agree upon."

We think it is entirely clear that the legislature only intended to limit the rate of interest, and that a construction which would forbid any payment of interest until the payment of the principal would be unreasonable, and unauthorized either by the letter or spirit of the statute. Whenever an authority is conferred and the particular mode in which it is to be exercised is not specified, if it relates to a subject-matter as to which the dealings and transactions of men have established a usual and ordinary mode, that may be adopted. The rate of interest is limited, but there is no provision as to the time of its payment; if the rate be not exceeded, the payment of the interest may be regulated according to the usual course of dealing in borrowing money and paying the price or compensation for its use. Interest being the price or compensation for the use of money, or, so to speak, what the money earns, it is not strictly taken in advance, if the use precedes the payment. When the use is for a short period, it is not usual in ordinary transactions to require the compensation until the end of the period; when the use is for a long period, it is; and whether, as the price or compensation accrues from the use, or is earned by the money, payments are to be made at intervals of a year or six months, can, in principle, make no difference. Such is the ordinary mode of dealing, and we see no reason why it might not be, legally and properly, adopted by the corporation. Our attention has been directed to a number of railroad charters in which it is provided that payment of interest shall be made semi-annually. This appears to us rather as evidence that a payment in that manner was in accordance with the usual course in such transactions, than as indicating that, in the absence of such a provision, the same manner might not be adopted. We are satisfied that this objection to the validity of the bonds cannot be sustained.

The next objection to be considered relates to the validity of

the mortgages. The power was to secure the payment of money borrowed at a rate of interest not exceeding seven per cent per annum; and this power, it is claimed, does not extend to the securing the payment of bonds sold at less than par, or exchanged for iron rails. Undoubtedly, this would be a very serious objection, if there had been no other legislation upon the subject. But by an act passed on the third of March, 1851, it was enacted that "the directors of any railroad company are hereby authorized to sell or negotiate the bonds or notes issued by said company, or received by it in payment of subscription to its capital stock or otherwise, at such times and in such places, either within or without this state, and at such rates, as in their opinion will best advance the interest of such company; and if such bonds or notes are thus sold at a discount, such sale shall be as valid in every respect as if sold at their par value:" Swan's Stat. 200, note. And by another act, passed on the third of March, 1852, it was enacted "that the directors of any railroad company, authorized to borrow money and execute bonds or promissory notes therefor, shall be, and they are hereby, authorized to sell, negotiate, mortgage, or pledge such bonds or notes, as well as any notes, bonds, scrip, or certificates, for the payment of money or property which such company may have heretofore received, or shall hereafter receive, as donations, or in payment of subscriptions to the capital stock, or for other dues of such company, at such times and in such places, either within or without the state, and at such rates and for such prices, as, in the opinion of said directors, will best advance the interests of such company; and if such notes and bonds are thus sold at a discount, such sale shall be as valid in every respect, and such securities as binding for the respective amounts thereof, as if they were sold at their par value:" Swan's Stat. 240.

The objection, therefore, turns upon a question of construction. It is claimed that while the first statute undoubtedly authorized a sale of bonds issued by the company at a discount, and made them as valid in every respect as if sold at par, this validity must be understood in view only of a liability upon the bonds as evidences of indebtedness, to be enforced by action against the company, and did not extend to the security which the company was authorized to give by a pledge or mortgage of its property. The statute must, we think, be taken for the purpose of construction, in connection with the former provisions upon the same subject, which have been cited. Those

provisions very clearly contemplated an issue of but one description of bonds, which were to be executed for money borrowed, and their payment to be secured by a pledge or mortgage of the property and income of the company. By the act of 1851, the directors of the railroad company were authorized to sell or negotiate "the bonds issued by such company," referring, we think, to a definite description of bonds, as to which a previous authority had been given; and that description embraced the aggregate amount of the bonds, the sums in which they were to be issued, and the security to be given for their payment. The only object of the act was to take off the restriction, which might be inferred from the rate of interest, that they could not be sold at less than par. We feel so entirely clear that this is the proper construction of the act of 1851, that we need not inquire whether the act of 1852 is more explicit, or how far it applies to the bonds and mortgages in this case.

But it is urged, that for some of the bonds secured by the first mortgage there was received, not money, but iron rails, and that the mortgage was made with that view, and was therefore invalid. Practically, the only objection to receiving for the bonds property needed by the company instead of money would be that it might be a device to dispose of the bonds at less than their par value. If in fact the par value of the bonds was received, it could make no conceivable difference whether it was in money or in money's worth. But when authority is given to negotiate the bonds at less than their par value, there can be no possible propriety in acting upon any such distinction. If we have correctly construed the act of 1851, it allowed the company to dispose of the bonds, with the mortgage security, at less than their par value. It could then make no difference whether the bonds were sold at a reduced rate and the iron rails bought for cash, or the bonds exchanged directly for the iron rails; and the transaction might easily be made to assume either form. We know of no rule applicable to such cases as the present that will prevent our taking the statutes together and giving them a just and reasonable construction. And when we clearly see what was the intention of the legislature, we are not bound to give to the language an interpretation that would be strained and unreasonable: *Perrine v. Chesapeake and D. Canal Co.*, 9 How. 172-192.

Having disposed of the objections to the validity of the mortgages, and found that they are valid securities upon the

property and rights which the law authorized the company to pledge, we have to inquire into their effect and operation, both as regards the priority between them and the claims of other parties. It is evident from an inspection of the mortgages, which are in the ordinary form of railroad mortgages, and contain the usual conditions and stipulations found in such mortgages, that it was the intent of the parties to create a security, on the entire property of the company and the profits to be derived from its use and operation as a railroad, for a permanent investment of capital, so that the parties investing might rely for a number of years upon receiving a semi-annual interest, and at the end of the time the return of the principal. The arrangement would necessarily authorize and require the directors of the company to operate the road, and out of the earnings pay the interest as it accrued, preserving the property as a security for the interest and the principal. But this arrangement was clearly intended as a security merely for the payment of the bonds executed for money borrowed, and an arrangement for any other purpose would not have been authorized by the power under which the company acted.

It cannot be supposed that it was even understood by the parties to the arrangement, that it gave a right as against the claims of third persons, to insist that the directors of the company should use the entire property and income, for the whole period the loan had to run, so that they might be able to comply with the terms of the arrangement. Their acts show the contrary, for we find that there was a second mortgage executed to the trustee in the first, and afterward a third mortgage given upon the same property. If other liens might be created upon the property conveyed under the special power, which we have no doubt could be done, as the power would not be exhausted until bonds had been executed to the amount authorized, we see no reason why other liens might not be created upon that part of the property subject to the disposition of the company under its general powers. The effect of the provisions authorizing the pledge or mortgage for borrowed money operates, as we have held, to extend the powers of the company as to the nature and character of the property it might convey. This extension of power could in no way operate as a restriction of other powers as to the disposition of property. The provisions in the law were permissive; the company was not bound to borrow money in that way or with that security; it was left entirely free to exercise its general

powers. We find, then, in the provisions no exemption of the property of the company from the operation of liens or claims created by its own acts, or resulting from judicial proceedings. Those who take a mortgage upon property to secure a loan for a long period of time, however desirable it may be to have the arrangement carried out, may be disappointed, owing to an imperfection incident to such an arrangement—an imperfection resulting from the policy of the law that parties cannot be permitted to retain indefinitely the use and enjoyment of property, by simply giving a security upon it for the payment of a debt. The property must be subject in some form to just claims against the party subsequently arising, and this will frequently and necessarily lead to an interruption and disappointment in a prior arrangement, as to the time within which it is to be performed.

It follows, from these views, that while, as between the company and the first mortgagee the property may well be regarded as an entirety (and this is, perhaps, shown from the whole scope of the instrument, and may affect, in several particulars, their respective rights, into a consideration of which we are not led by any circumstances in this case), such a result, from the acts of the parties to the mortgage, cannot affect the rights of other parties, upon which we are required to adjudicate. The company did not denude itself of the power to execute other mortgages upon the same property, or upon any part of it, which they had the legal right to dispose of, and certainly could not, by its own act, exempt from the claims of its creditors any part of its property. The mortgagee, then, standing in the same position as an ordinary mortgagee, who has given an extended credit, or put money at interest for a number of years, cannot object to the creation of other legal liens upon the property embraced in the mortgage. When those liens are sought to be enforced by a removal of the property, he might justly complain if his security was thereby endangered. Upon what grounds, in what manner, and to what extent relief would be given in such a case, we are not now called upon to decide, further than to say it could not be upon the ground of any exemption from liability for other debts, which the parties to the mortgage might attempt to create.

This brings us to the consideration of the claim of a creditor in this case. It appears that the defendant Hilliard, on the tenth of March, 1857, recovered a judgment for the sum

of eight thousand and nine dollars and seventy-four cents, with costs of suit, "for moneys advanced by said Hilliard in payment of interest for said company, and taxes assessed against said company, and for certain rights of way paid by said Hilliard;" and that Hilliard caused an execution, issued on his judgment, to be levied on a part of the railroad of the company, together with the rails, superstructure, bridges, viaducts, and appurtenances; also, upon two steam locomotives and tenders attached, upon two first-class passenger-cars and two second-class passenger-cars, one baggage-car, and a number of box or freight cars; also, two iron safes, one in the depot-house, and the other in the ticket-office at Columbus; "which said judgment is still unpaid, and said levy still standing." It also appears that the judgment in favor of Hilliard was recovered, and the levy of the execution thereon made, after the appointment of the receivers in this case by the court of common pleas, and whilst the property so levied upon was in the hands of said receivers, under the order of that court.

From what has been before said, it obviously results that, as to the real estate levied upon, the same being part of the railroad, the lien of the legal mortgages would prevail over the claim of the creditor. His right to levy on a part of the railroad, or on the real estate held for the use of the franchise of the corporation, has not been pressed in argument. We have already intimated that as to an interest in real estate, held for the sole and exclusive purpose of the exercise of a franchise, it could not be alienated by the corporation, and, of course, would not be liable to execution. Such, we are inclined to think, is the character of the interest in this case; but we do not feel called upon to make a definite decision. It would, in view of any rights of the defendant Hilliard, be a mere abstract question, when the validity of the mortgages has been affirmed. The contest, on the part of that defendant, has been to obtain satisfaction out of the personal property, and particularly that part of it acquired after the date of the last mortgage.

A very serious objection exists to the claim of the defendant Hilliard, upon the ground of his levy having been made while the property was in the custody of a receiver of the court. We incline to think that the court of common pleas might very properly have ordered the sheriff to withdraw his levy and answer to the court for a contempt in making it. Such appears to have been the course pursued by the lord chancellor, in the case of *Russell v. East Anglian Railway Co.*, 6 Rail. &

Cenral Cas. 501-522. But no such step was taken, and the finding of the court, although it shows the fact of the levy having been made while the property was in the hands of the receiver, also shows that the judgment is unpaid and the levy still standing. We may therefore, in the absence of any objection, infer that the court permitted the levy, so as to enable the judgment creditor to secure any rights to the property which a levy would give, in the event the claims in the action, in which the receiver was appointed, should not be prosecuted or should not be maintained.

We have already held that the judgment creditor would have a right to levy upon such personal property as is described in the return upon the execution in this case; and that the mortgages, though covering the property, would not prevent creditors, by a levy upon it, from obtaining a lien as to any interest of the mortgagor subject to the levy, such as possession coupled with a beneficial use: *Curd v. Wunder*, 5 Ohio St. 92. And we have also held that the mortgages, which were duly executed and recorded, created a lien upon the after-acquired property, of which the property levied on constituted a part. But a defect is claimed to exist in one of the mortgages. It was executed in New York, and acknowledged before a commissioner appointed under the laws of Ohio, but having no authority under the laws of New York. This mortgage has but one witness. As the question whether such a mortgage would be valid as a legal mortgage may arise in cases where the merits of the controversy will more depend upon its solution, we feel a liberty to pass it by; for, assuming that the second mortgage is to be regarded as a mere executory contract, we think that, under the circumstances of this case, it must be preferred to the claims of the creditor. The action was brought to enforce the claims of those interested in both mortgages. As against the company, there was a right to relief, whether the mortgage be regarded as a legal or equitable claim. The mortgage at least showed a contract, which a court of equity would have directed to be perfected. There was, then, a *lis pendens*, which a subsequent claim could not defeat. It appears, moreover, that a receiver was appointed, who took actual possession of the property; and this must, we think, if it were necessary, be regarded as tantamount to a possession by the mortgagee. In any view, therefore, the claim of the defendant Hilliard, as a judgment creditor, must be postponed to the mortgages.

It appears that the consideration of the debt for which the defendant, Hilliard, recovered a judgment, was for moneys advanced in payment of interest and taxes, and for right of way. This, it has been suggested, gives him an equitable claim as against the mortgagees. We have already adverted to the peculiar position in which the nature and character of the mortgages place the directors of the company and the mortgagees. The directors acquire property for the use of the road; this may be done from the earnings of the road, with money borrowed, or upon a credit. But the property acquired becomes the property of the company, and thereupon subject to the mortgages, under the construction we have felt bound to give to the statute. Those who advance money, or sell on credit, to the directors of the company, are bound to take notice of the claim which will arise under the mortgages, which are required by law to be recorded in each of the counties through which the road passes; if they part with their money or property without taking security, we know of no principle upon which one can be created for their benefit. We are not inclined to exempt the company or the mortgagees, from the application of any rule of law which would properly apply to the dealings between them, or to the property which is the subject of those dealings, and which would secure or protect the just claims of third persons. But we are bound to respect the claims of the mortgagees, and do not feel authorized to modify the settled rules of law which govern the dealings of third persons with the directors of the company, so as to impair that security which the mortgagees, under the terms of a contract authorized by law, have obtained. It is possible particular cases may arise which, owing to the peculiar relation between the directors of the company and the mortgagees as to the use and disposition of the property and income, may present equitable considerations calling for relief. But we need not discuss or conjecture the character of such cases. It is sufficient to say that none of the claims in this case present such considerations.

It is proper to notice here a question as between the second and third mortgages, growing out of the same defect in the execution of the second mortgage, which has been before mentioned. Upon the principles which have been stated, applicable to mortgages of real estate, even notice of a prior equitable mortgage would not make it valid as to a subsequent mortgage. Does this principle apply to the third mortgage in this

case? We think it does not. It was not intended by the statute, upon the construction of which the principle depends, to give to any mortgage, upon the ground of its prior record, an effect forbidden by the very terms of the mortgage itself. The third mortgage is expressly made subject to the first and second mortgages, and, according to the clear intent of the parties expressed upon its face, can only operate as a security upon that part, or so much of the property as is not required for the payment of the bonds mentioned and specified in the first and second mortgages.

We are now able to state our conclusion as to the position in respect to priority of the different claims which have been considered. The first mortgagee has the first lien upon all the property; then the second, and then the third; and then the judgment creditor, as to the personal property upon which he has been permitted to secure a lien by his levy. And it now remains to inquire in what mode the property is to be disposed of to satisfy these claims. It is the necessary result of the principles which have been announced as applicable in this case that the parties are entitled to a sale of the property. That property, according to the conclusion we reached, after an extended examination of the question, is both real and personal. It may be that under the contract between the company and the mortgagees, and for some of the purposes shown by that contract, the property should be regarded as an entirety; but even as between the parties to that contract, when it has been broken, and a remedy is sought, the reasons for preserving the entirety of the property cease. The remedy must be taken in conformity with the rules of law, and the practice of the court, applicable to the description of property which is the subject of the contract. The sale, therefore, of the real estate must be made according to the rules governing sales of real estate.

We regard the plaintiff as proceeding for a sale of real estate, under a mortgage, and that real estate one entire tract, though situated in two or more counties. Considered as an entire tract, indivisible for the purpose of sale, it fairly comes within the provision as to the jurisdiction of the court. Code, sec. 46. It should therefore be sold as an entire tract; and the proceedings incidental to the sale will, of course, be in the county in which the court sits. With the real estate, and connected therewith, the franchise of the corporation to maintain the railroad, and demand compensation for the transportation of pas-

sengers and property must be sold. This franchise will be taken by a purchaser with the rights and subject to the restrictions prescribed by law. If other facilities and means for its beneficial enjoyment than those now provided by law are required, we cannot doubt but that, upon a proper appeal to the legislature, they will be supplied. It is the settled policy of this state—it has been the uniform practice, and we think upon a fair construction it is the requisition of the statute—that there shall be an appraisement in a proceeding for a sale of real estate under a mortgage. We do not feel, therefore, that we would be authorized to exercise a discretion, or to sanction the exercise of a discretion, to order otherwise. Indeed, if it were a matter of discretion, in our opinion, an appraisal would be just and proper, and we can see no practical difficulties in making that appraisal.

It is said there may be difficulty in correctly ascertaining the value of such property. Such a difficulty not unfrequently arises as to other real estate. Improvements are constantly being made and connected with real estate, the value of which comparatively few persons can appreciate. It may be that any three freeholders, selected without reference to the duty to be performed, might not be able to make a correct estimate of the value of a railroad, and the franchise of making profit from its use. But we are not to suppose that the officer authorized to sell the property will take no care in the selection of appraisers, and we cannot doubt but that three competent men may be found. The very difficulty of ascertaining the value makes it the more important that every precaution which the rules of law will permit should be used to prevent a ruinous sacrifice of the property. If a careful examination of the property be made by competent persons, their estimate of its value will give confidence to purchasers, and probably be the means of a sale at a higher price.

We have said that as to an appraisement there is no discretion; but as to matters connected with it, we think there is a discretion to supervise the proceedings of the officer; and a more stringent or more liberal rule, as the case may require, than the one ordinarily adopted may well be applied, on account of the peculiar character of the property.

In like manner, as to the personal property, we think the court may, in its discretion, take such steps as will probably lead to an advantageous sale, and prevent a sacrifice. There will also be a discretion to guard against the failure of a sale,

and the consequent expense and delay, by requiring a deposit of money, or other satisfactory security, that the terms of the sale will be complied with.

There is a question connected with the distribution of the proceeds of any sale which may be made, to which our attention has been directed. The court was asked to allow to the mortgage trustees, and their counsel, a compensation for services, and to charge it on the fund to be realized from the sale. The court directed an allowance, but ordered it to be deducted out of the amount coming to the respective parties upon distribution. We think the court erred in making any order whatever upon the subject.

We do not understand that the mortgagees in this case came before the court in the character of trustees of any property or fund which would authorize the court to charge upon that property or fund their expenses. They are not, and never have been, in possession of the property. They hold a legal title as security for certain creditors of the company, and in substance it is the same thing for the purposes of this action as if the title had been conveyed directly to the creditors. There was a convenience in selecting some person to take the title for the benefit of those to whom the bonds might be negotiated. The mortgagees in this case who assumed that office might very properly have stipulated with the company for a compensation, and, perhaps, did so. But we cannot now recognize them in any other character than as ordinary mortgagees, and feel no more at liberty to pay them for their trouble, or to pay their counsel fees out of the proceeds of a sale of the property, than we would in any ordinary case.

We are aware that, in the instruments executed by the company, which are all in the same form, there are provisions which purport to create a trust, or a power to sell. We should infer, from several of the provisions in the instruments, that they were drawn with but a limited knowledge of, and apparently without reference to, the laws of this state. We certainly do not understand that we are called upon to aid in the execution of that trust, or that a sale under the authority which the instruments purport to give is desired. The instruments also contain the proper elements of a mortgage. There is a conveyance of the title, to secure the payment of money and interest thereon, with a defeasance. It is that part of the instruments which we think the court is required to enforce, and in view of which only we have sustained the claims of

the mortgagees in this action. They must take their relief upon the same terms as others are required to do who hold a like security. However desirable and just it may appear, in particular cases, to charge upon the defendant or his property the fees of the counsel who represent the plaintiff, such is not the policy of this state. Even the small docket fee once allowed was abolished by the legislature. We know of no rule or principle which will entitle us to deviate from that policy in this case.

The position in which we have held that the mortgagees stand disposes of another question which has been presented. They are entitled to receive the money coming to those for whose benefit they hold the securities, and with them, and not with the bond-holders, any contest as to the amount due upon those securities must be made, and must be made upon an issue in the action. The bond-holders are not necessary or even proper parties to the action, and the order requiring them to appear and prove their claims before the receiver is erroneous. It is true that the bond-holders might have a right to intervene if the mortgagee acting for them was not responsible, or was likely to prove unfaithful to his trust; but that is a matter entirely between them and the mortgagee. The only concern of the company after the amount due upon the security has been ascertained is that, at the time or before any payment is made, the bonds, being negotiable and not due, should be produced and canceled if paid in full, or credited on their face with the amount paid. It would be the duty of the court to secure this protection against further liability to the company. This protection does not require that all the bonds should be produced, or that an account should be taken of the claims of those who hold them. Each bond, by the terms of the security, stands as an independent claim, entitled to its proper proportion of any fund which may be realized. Payment, therefore, may and ought to be made to the extent the bonds are produced, and canceled or credited. If there be a question as to the title to any of the bonds, or a question as to the proportion of the fund coming to any bond lost or destroyed, or any question between the mortgagee and any bond-holder, the contest between those interested may be settled in a supplementary proceeding, or in another action, and such difficulties need not be anticipated.

We believe that we have disposed of all the questions which have been presented for our consideration except one, which is

collateral, arising upon a cross-petition filed by Lincoln Goodale. The substance of the claim of Goodale is, that by an arrangement between him and the company the latter was allowed to enter upon his lands and construct its road thereon, with such works as might be necessary for its completion; that within one year appraisers should be selected, and make an award of the amount to be paid to Goodale for such use of his land; that the amount of such award should be paid to Goodale within sixty days after it was made; that upon failure, the license to enter upon and the right to use the lands should cease, and any right or interest of the company under the agreement, and its fixtures and works, should be and remain the property of Goodale, "as if said agreement had not been made, and said company had, without authority and in its own wrong, entered upon said land and made said road through the same." The award having been made, but the payment of the amount awarded not made within the time, the court was asked to enforce, by injunction against the company and the receiver, the right of Goodale under the agreement, and to restrain the company from any use of the track constructed upon the lands.

When a party voluntarily allows, for a stipulated consideration, such use of his property, he cannot, by agreement, secure a right to such an extraordinary remedy as an injunction. The insertion in the agreement of a stipulation that in the event of its non-fulfillment the party thus using the property is to be regarded as using it wrongfully and without authority, cannot make the fact so in view of such a remedy. It is rather in the nature of a forfeiture which a party certainly cannot come into a court of equity to enforce by an injunction. We think, therefore, that the court very correctly refused the injunction asked by Goodale, and properly left him to pursue such legal remedies as he might be advised to pursue. The only application he could, probably, with any propriety make in this case, would be for permission to proceed in an action against the receiver to recover the possession of the property.

For the other errors, which have been pointed out, the judgment of the court of common pleas must be reversed.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and PECK, JJ., concurred.

RAILROAD CORPORATION'S POWER TO TRANSFER ITS FRANCHISES AND PROPERTY.—The power of corporations in general to alienate or mortgage their property, especially their realty, is considered at some length in the

note to *Leggett v. N. J. Manufacturing etc. Co.*, 23 Am. Dec. 740. It is now our purpose to inquire what franchises and property of railroad corporations, in particular, are not transferable, voluntary or involuntary. The principal case is one of the very few which consider this question at all satisfactorily. Indeed, about the only proposition that the cases agree upon is that a railroad corporation cannot, independent of legislative authority, alienate or mortgage its franchise to be a corporation: *Commonwealth v. Smith*, 10 Allen, 448; *East Boston Freight R. R. v. Hubbard*, Id. 459, 460; *Richardson v. Sibley*, 11 Id. 65; *Hall v. Sullivan R. R.*, 21 Law Rep. 138; S. C., 1 Brun. Col. Cas. 613; *Pierce v. Emery*, 32 N. H. 484; S. C., 2 Redfield Ry. Cas. 631; *Richards v. Merrimack etc. Co.*, 44 N. H. 127, 136; *Bardstoun etc. R. R. v. Metcalfe*, 4 Met. (Ky.) 199; *Arthur v. Commercial etc. Bank*, 9 Smad. & M. 394; S. C., 48 Am. Dec. 719; *Kennebec etc. R. R. v. Portland etc. R. R.*, 59 Me. 9, 23; *Shepley v. Atlantic etc. R. R.*, 55 Id. 395, 407; *Stewart's Appeal*, 56 Pa. St. 413, 422; *Pittsburgh etc. R. R. v. Allegheny Co.*, 63 Id. 126, 135; *Clark v. Omaha etc. R. R.*, 4 Neb. 458, 465; S. C., 19 Am. Ry. Rep. 423, 430; *State v. Consolidation Coal Co.*, 46 Md. 1, 9, 10; *Hays v. Ottawa etc. R. R.*, 61 Ill. 422; *Wood v. Bedford etc. R. R.*, 8 Phila. 94; *Pearce v. Madison etc. R. R.*, 21 How. 441; and therefore, where a railroad is not authorized to mortgage or sell its franchise to be a corporation, a judicial sale upon mortgages executed by it would not invest the purchasers with any corporate capacity whatever: *Atkinson v. Marietta etc. R. R.*, 15 Ohio St. 21, 36; nor would the purchasers at an assignee's sale of the property and franchises of a bankrupt railroad corporation acquire the corporate entity or become stockholders, it would seem: *Metz v. Buffalo etc. R. R.*, 58 N. Y. 61; S. C., 17 Am. Rep. 201; compare *Commonwealth v. Central Passenger R'y*, 52 Pa. St. 506. But if a mortgage deed be construed as intending to convey the franchise to be a corporation, while in that respect it would be inoperative, it would not for that reason be entirely void, but might operate to convey the property of the company: *Butler v. Rahm*, 46 Md. 541; S. C., 18 Am. Ry. Rep. 86; and see *Pullan v. Cincinnati etc. Co.*, 4 Biss. 35.

With reference to the sale or mortgage of other franchises, however, the cases above cited are at variance. In *Hall v. Sullivan R. R.*, *supra*, Curtis, J., says: "The franchise to be a corporation is not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable;" and in *Bardstoun etc. R. R. v. Metcalfe*, *supra*, while it is held that a railroad cannot mortgage its corporate existence or any prerogative franchise conferred upon it, it is said that "the right to build and use a railroad is not a prerogative franchise." On the other hand, it is asserted, in *Pierce v. Emery*, *supra*, that "they may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any corporate right or franchise;" and in *Richardson v. Shiley*, *supra*, the court uses the following language, which, in our opinion, expresses the correct view: "A corporation created for the very purpose of constructing, owning, and managing a railroad for the accommodation and benefit of the public cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more

than a nominal existence;" and in *Pierce on Railroads*, 496, the doctrine is thus accurately summed up: "The company cannot, according to the current of the decisions, without special authority of statute, alienate its franchise, or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease."

The power to lease, as intimated in the last quotation, is placed on the same footing with the power to sell and mortgage: *Black v. Delaware etc. Co.*, 22 N. J. Eq. 130, 399; 24 Id. 455; *Thomas v. West Jersey R. R.*, 101 U. S. 71; *Middlesex R. R. v. Boston etc. R. R.*, 115 Mass. 347.

The power to sell, mortgage, or lease the franchises or property, even the franchise to be a corporation, may of course be expressly authorized by the legislature: 1 *Rorer on Railroads*, 257; 2 Id. 882; *State v. Sherman*, 22 Ohio St. 411, 428; *State v. Richmond etc. R. R.*, 72 N. C. 634; *Mahaska etc. R. R. v. Des Moines Valley R. R.*, 28 Iowa, 437; *East Boston Freight R. R. v. Eastern R. R.*, 13 Allen, 422; but a sale in a different manner from that authorized will be restrained, it is held: *Upson Co. R. R. v. Sharman*, 37 Cal. 644. Authority to a railroad company to mortgage its "road, income, and other property," does not authorize a mortgage of its franchises: *Pullan v. Cincinnati etc. Co.*, 4 Biss. 35; and where a charter grants the right "to acquire, alien, transfer, and dispose of property of every kind," the railroad may mortgage its property, as distinguished from the franchise: *McAllister v. Plant*, 54 Miss. 106; S. C., 17 Am. Ry. Rep. 389. As the legislature may authorize such acts, so it may ratify and confirm them when done without authority: *Shaw v. Norfolk Co. R. R.*, 5 Gray, 162, 179; *Richards v. Merrimack etc. Co.*, 44 N. H. 127, 136.

In regard to the power of a railroad company to dispose of its property, real and personal, independent of its franchises, the cases are likewise unsatisfactory: See *Shaw v. Norfolk Co. R. R.*, 5 Gray, 162, 180; *Arthur v. Commercial etc. Bank*, 9 Smed. & M. 394; S. C., 48 Am. Dec. 719; *Miller v. Rutland etc. R. R.*, 36 Vt. 452, 473; *Kelly v. Trustees of Alabama etc. R. R.*, 58 Ala. 489; S. C., 21 Am. Ry. Rep. 138; *Wood v. Bedford etc. R. R.*, 8 Phila. 94; *Richards v. Merrimack etc. Co.*, 44 N. H. 127, 136. The criterion given in the principal case, viz., that the company cannot alienate real property, acquired and held for the exclusive purpose of the exercise of a franchise which cannot be alienated, but that it may alienate things requisite for its use, after the road is constructed and prepared for use, which are to be regarded as personal property, seems to be the most sound, although some of the foregoing cases assert a broader doctrine, and some, even, a narrower one. With reference to personal property, however, there does not seem to be much doubt. Mr. Rorer states the result of the decisions as follows, in about as accurate a manner as is possible: "It is uniformly holden that railroad corporations may sell or mortgage their personal property, and in some of the cases, such property as is used in operating the road, if the same be not affixed thereto. In some cases the rule is extended further, and it is held that a railroad company may mortgage, without statutory permission, both its real and personal property." 1 *Rorer on Railroads*, 238.

A railroad bridge is not subject to a mechanic's lien, as being a building within the meaning of a statute making every "dwelling-house or other building" subject to a lien in favor of mechanics and materialmen: *La Crosse etc. R. R. v. Vanderpool*, 11 Wis. 119; but a building built for a railroad company is as clearly within the letter and spirit of the statute as any other building: *Hill v. La Crosse etc. R. R.*, Id. 214, 224.

As held in the principal case, a railroad corporation's power to alienate its

property, and the right of its creditors to subject it to their debts, stand upon the same footing. Therefore the rolling stock of a railroad is subject to attachment and to be applied in payment of the corporate debts: *Boston etc. R.R. v. Gilmore*, 37 N. H. 410; S. C., 72 Am. Dec. 336; and it is held that a judgment against a railroad becomes a lien upon its road and realty, in the same manner as upon the real estate of a natural person: *Ludlow v. Clinton Line R. R.*, 1 Flipp. 25. Again, in *Coe v. Peacock*, 14 Ohio St. 187, 190, it was decided that a railroad corporation might effectually mortgage its property connected with the railroad and the use of its franchise, whether real or personal, to be subsequently acquired, but that the existence of such a mortgage did not operate to exempt such property, in its nature personal, and while it remains in possession of the corporation, from being levied upon by judgment creditors of the company; and see *Coopers v. Wolf*, 15 Id. 521; *Coe v. Knox Co. Bank*, 10 Id. 412, 416.

Railroad corporations may be subjected to compulsory insolvency or bankruptcy proceedings: *Platt v. New York etc. R. R.*, 26 Conn. 544; *Winter v. Iowa etc. R'y*, 2 Dill. 487; and see *Central National Bank v. Worcester etc. R. R.*, 13 Allen, 105.

MORTGAGE OF AFTER-ACQUIRED PROPERTY, VALIDITY OF: See *Moody v. Wright*, 46 Am. Dec. 706, and note considering the question.

THE PRINCIPAL CASE IS QUOTED and commented upon in *Dinmore v. Racine etc. R. R.*, 12 Wis. 659, 663, in holding that a railroad, with all its rights, franchises, and property, is not an entirety; and see it cited on this point in *Hill v. La Crosse etc. R. R.*, 11 Id. 226; it is also quoted in *State ex rel. Shoemaker v. Trustees of Goshen Township*, 14 Ohio St. 585, to the effect that under an authority given to a railroad company to sell and negotiate its bonds, an exchange of such bonds for railroad iron may properly be made; and again quoted in *Berens v. Cockertill*, 20 Id. 166, on the point that it was not intended by the statute to give to any mortgage, upon the grounds of its prior record, an effect forbidden by the very terms of the mortgage itself; it is cited in *Bundy v. Iron Co.*, 38 Id. 312, on the point that where a second mortgage was executed in due form by a corporation, and was made expressly subject to a prior mortgage, all subsequently acquired liens that are subject to the second mortgage are necessarily also subject to the first; in *Lane v. Baughman*, 17 Id. 648, to the point that an execution creditor has a right to levy on mortgaged property for the purpose of obtaining a lien, as to any interest of the mortgagor subject to levy, but when such lien is sought to be enforced by a removal of the property, the mortgagee may justly complain; in *Port Clinton etc. R. R. v. Cleveland etc. R. R.*, 13 Id. 555, its language as to whether and when a court of equity can undertake, by means of a receiver, the business of operating a railroad, is quoted; in *Hays v. Gallon Gas Light etc. Co.*, 29 Id. 337, it is cited to the point that a trustee of an express trust, or one in whose name a contract is made for the benefit of another, may, under the code of procedure, sue without uniting with him those for whose benefit the action is prosecuted; and it is further cited in Id. 335, to the point that doubtless one of the considerations which give rise to the rule laid down in it, that bond-holders, when numerous, were, in an action of foreclosure, neither necessary nor proper parties, was that it frequently happens, especially in the business of great corporations, that the holders of the bonds are so numerous that it would be, not merely inconvenient, but utterly impracticable, to bring them all before the court in a proceeding to foreclose the equity of redemption.

CASES
IN THE
SUPREME COURT
OF
OREGON.

MONROE v. HUSSEY.

[1 OREGON, 138.]

SALE OF PERSONAL PROPERTY, NOT FOLLOWED BY DELIVERY, IS VOID at common law as to the creditors of the vendor; but under the Oregon statute such sale is valid as to creditors, if the bill of sale is recorded within ten days thereafter.

FORECLOSURE of chattel mortgage upon the following facts: One Savage mortgaged to the plaintiff certain personal property, of which he retained the possession. The mortgage was never recorded, and subsequently to its execution, defendant, in an action against Savage, attached the mortgaged property, sold it on execution, and became the purchaser thereof.

N. Huber, for the plaintiff in error.

M. Chinn, for the defendants in error.

By Court, WILLIAMS, C. J. Is the law for the plaintiff or the defendants upon these facts? When the said mortgage or bill of sale—for it purports to be an absolute bill of sale—was made, the act of 1853 (Sess. Laws 1852-1853, p. 65) was in force, which provides that “no bill of sale for the transfer of personal property shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor’s office of the county in which the property is situated within ten days after such sale shall be made.” Defendants, it is said, are not protected by this statute, because they were not “existing creditors” when the bill of sale was made.

Admitting that defendants are beyond the purview of said statute, which is not entirely clear, then, without doubt, their rights are to be ascertained and determined by the common law. Chief Justice Marshall, in the case of *Hamilton v. Russell*, 1 Cranch, 310, says in some cases a sale of a chattel, unaccompanied by a delivery of possession, appears to have been considered as an evidence or badge of fraud to be submitted to the jury under the direction of the court, and not as constituting in itself, in point of law, an actual fraud, which rendered the transaction, as to creditors, entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale, where the possession does not accompany and follow the deed, is, with respect to creditors, on the sound construction of the statute of 13 Eliz., c. 27, a fraud, and should be so determined by the court. He adds, that the said statutes "are only declaratory of the principles of the common law." Justice Story, in the case of *Meeker v. Wilson*, 1 Gall. 424, says that "by the common law, a grant or assignment of goods and chattels is valid between the parties, without actual delivery thereof, and the property passes immediately upon the execution of the deed; but as to creditors, the title is not considered as perfect, unless possession accompanies and follows the deed. The want of possession is considered in some of the authorities as an evidence or badge of fraud to be submitted to the jury; but the more modern authorities hold it as constituting in itself, in point of law, an actual fraud, which renders the transaction, as to creditors, void."

Judge Story, after stating that it is now fully settled that the said statutes of Elizabeth are only in affirmance of the common law, adds that, upon principle, independent of all authority, it would seem that substantial justice requires that a party who has a secret transfer of property left in the possession of the original owner should be held to waive his rights in favor of creditors and public officers, even if the case were not held infected with fraud. *Vigilantibus non dormientibus leges subserviunt*. Here was an unconditional sale by Savage to plaintiff, unaccompanied by possession, and therefore we must conclude that it was not good as against defendants, who are attaching creditors: *Twyne's Case*, 3 Co. 81; *Edwards v. Harben*, 2 T. R. 587; *Sexton v. Wheaton*, 1 Hare & Wall. Am. Lead. Cas. 1. Notice of plaintiff's bill of sale to defendants, after the attachment was levied, avails

nothing, for their rights relate to and take effect from the levy of the attachment.

Judgment for defendants.

SALE OF CHATTELS WITHOUT IMMEDIATE DELIVERY IS VOID against creditors: See *Born v. Shaw*, 72 Am. Dec. 633, and note 634, in which the cases upon this subject are collected.

TERRITORY OF OREGON v. COLEMAN.

[1 OREGON, 191.]

SAME ACT MAY CONSTITUTE CRIMINAL OFFENSE AGAINST UNITED STATES, AND ALSO AGAINST STATE in which it was committed, and punishment by the one cannot be pleaded in bar to a conviction by the other. Selling liquor to Indians in the territory of Oregon is such an offense.

INDICTMENT for selling liquor to Indians under legislative act of the territory of Oregon. Defendant claimed that this law is invalid, because congress had provided for the punishment of the same act. Reserved for decision upon this point.

R. P. Boise, for the plaintiff.

D. Logan, for the defendant.

By Court, WILLIAMS, C. J. No power, it is argued, existed in the territorial assembly to enact a law of this kind, as congress had legislated upon the subject; and if the defendant is convicted and punished under the territorial law, he may also be convicted and punished for the same act under the law of congress, and thus be twice punished for the same offense. This express question has been decided by the supreme court of the United States. Justice Grier, in the case of *Moore v. People of Illinois*, 14 How. 13, says: "An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which

the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the state, a riot, an assault, or a murder, and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either, or both, may, if they see fit, punish such an offense, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for either of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. State of Ohio*, 5 How. 432, that a state may punish the offense of uttering or passing false coin as a cheat, or fraud, practiced upon its citizens; and in the case of *United States v. Marigold*, 9 Id. 560, that congress, in the proper exercise of its authority, may punish the same act as an offense against the United States." This case clearly falls within the rule here laid down, and therefore the territory is entitled to a judgment.

Judgment for plaintiff

ARMSTRONG v. ARMSTRONG.

[1 OREGON, 207.]

DISTRIBUTION OF ESTATE OF INTESTATE is governed by the law in force at the time of the distribution, though passed after the death of the intestate.

APPEAL from order of distribution. P. M. Armstrong died intestate in 1853, leaving a widow, but no children. Plaintiffs, brothers and sisters of the deceased, claimed equal shares with the widow in the estate of the deceased, which was composed of personal property. The court, under a law passed in 1854, set aside the entire estate for the widow, and plaintiffs appeal.

Pratt and Logan, for the appellants.

Campbell and Grover, for the appellee.

By Court, WILLIAMS, C. J. Chapter 12, page 882, of the Oregon statutes provides, in effect, "that when a married man shall die intestate, and without issue, his widow shall be entitled to all the personal estate that remains, after the payment of debts and expenses, as prescribed by law." Section 3 of said chapter is as follows: "When, as doubts have arisen as to what has been the law in relation to the distribution of personal estate in this

territory, the rule of distribution established by this chapter is hereby declared to have been the law of the land since the first session of the legislative assembly of this territory, begun and held at Oregon City, on the sixteenth day of July, A. D. 1849; provided, nothing in this section contained shall be so construed as to disturb the settlement of any estate whereof administration is complete and distribution made."

All of said chapter took effect on the first day of May, 1854; and although it undertakes to declare what the law had been prior to that date, it only amounts to a rule for the distribution of the estates to be settled and distributed after the enactment of the statute. No settlement or distribution of the estate in question took place till December, 1854; and the only question, therefore, to be decided in this case is, whether such estate should have been distributed in accordance with the act of 1854, above cited, as contended by the widow, or whether it should have been distributed in accordance with the law in force at the time of Armstrong's death, as contended by appellants.

All parties agree that, at the time of Armstrong's death, there was no legislative enactment for the distribution of estates in this territory, and much confusion has consequently arisen as to the common-law rights of the parties; but as we feel bound to apply the statute of 1854 to the estate in suit, any opinion as to the state of the law prior to that time will be unnecessary and out of the case. We hold that after the payment of the debts and expenses, as provided by law, Mrs. Armstrong is entitled to all that remains of the personal estate of her deceased husband; and this judgment, we think, is supported by principle as well as authority. Independent of any rule of law or regulation of society upon the subject, there seems to be no good reason why an intestate's effects should be taken from the widow and given to the brothers and sisters of the deceased. Nothing but the naked ties of consanguinity can be urged in favor of their right. None of the estate is inherited from or through them. None of it is accumulated by their diligence or labor. Mere relationship, however, is not, generally, the only ground of a widow's claim. Marriage not only makes the parties thereto one in name, but creates a community of duties and interests, so that the estate of a married man, deceased, is, oftener than otherwise, the joint fruit of the united industry and care of both husband and wife. Natural equity, therefore, acting upon a general rule in the

distribution of an estate, would not prefer the collateral relations by blood to the widow of the deceased; from which it will follow, that all pretense of right by appellants to the property in dispute is derived from and dependent upon the will of the law-making power. Manifestly, the law-giver may change or make his legislative will at any time before it takes effect, or becomes executed, and of course any right growing out of it, and dependent upon such will for its existence, must be correspondingly changed or revoked. Now, it would seem obvious to any one that the will of the law-maker relative to the distribution of the property does not take effect until the distribution is made; and, upon this ground, it may be safely affirmed that the law of 1854, before quoted, though enacted after Armstrong's death, was applicable to the distribution of his estate made after its enactment.

Appellants, however, contend that the title to a portion of their deceased brother's estate vested in them at the time of his death, so that the legislature had no power, by subsequent act, to divert any and give it to another. Now, if it be true that said property did vest as claimed, then it is also true that said statute cannot operate so as to give it to the widow, for the organic act provides that no man shall be arbitrarily deprived of his property. But it is not true that the title to any part of Armstrong's estate vested in the appellants at the time of his death; and therefore it is not exempt from the operation of the said statute upon that ground. Appellants cannot show one of the ordinary marks or signs of title to any part of this estate. They have no right of possession—no interest that can be taken for their debts—nothing that can be applied to their use. They may have an expectancy dependent upon a contingency, but this is far from title. All the personal property of an estate is vested in the administrator. He is entitled to its possession as against all other persons, and may sell it and convey a perfect title; no one else is recognized as owner by the law. But it is said the administrator holds the estate in trust, and this position is correct, but of no avail to appellants. When a man dies intestate, the supreme authority of the law takes his personal estate, and gives it away according to its absolute will and pleasure. It may give all to the father, brother, widow, or any other relative of the deceased, or may make division among any or all of them. Its high behests upon the subject it can make or unmake, as its views of policy and right may change; and no one can defeat the constitu-

tional exercise of this arbitrary power. But the law must of necessity have an agent to execute its will. Its agent as to the effects of the deceased persons is an administrator. He holds the estate in trust, not for any particular person or persons, but to be disposed of as the law shall direct, and is made responsible for what he may receive in his fiduciary capacity to those whom the law authorizes to call him to account. Now, when an administrator goes to distribute an estate, he must look exclusively to the law for directions, not those directions which it gave before his appointment, or at any prior time, but to such directions as it gives when the distribution is made. Admitting, what is a matter of doubt, that the law at the death of Armstrong promised to give a portion of his estate to appellants, the right of the law to make that promise before distribution is clear, upon the well-known principle that the mere promise to give a thing does not, before delivery, bind the promisor, or confer any right upon the promisee.

But it is argued and not denied that the law cannot be so changed after a man's death as to exempt his estate from the payment of those debts created in his life-time; and some effort has been made to apply that doctrine to this case. Appellants, however, cannot place themselves on the same footing with creditors. When two men make a contract, it is implied, if not expressed, that not only they but their respective estates shall be bound for its fulfillment. Creditors claim upon this ground, and any law, therefore, declaring that a decedent's estate shall not be liable for his debts is a law impairing the obligation of contracts, and void: Oregon Stats., p. 25, tit. Organic Act.

Appellants do not pretend to claim any part of the estate in question by virtue of a contract. They claim by operation of law; but before their claim could be allowed, the law had ceased to operate in their favor. Appellants, we think, had no vested rights in the estate of their deceased brother, according to the authorities. Williams, in his work on executors, p. 790, says that "an executor or administrator has the same property in the personal effects of an estate as the deceased had when living, and has the same power to bring actions in reference thereto."

"On the death of the testator or intestate, his executors or administrators, in point of law, are the owners of the goods which belonged to him, and may declare for them as their own, when damaged by another:" *Hollis v. Smith*, 10 East, 295.

"It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate, and that they cannot be followed by creditors or legatees into the hands of the alienee:" *Whale v. Booth*, 4 T. R. 625, note; *Nugent v. Giffard*, 1 Atk. 463.

"After the death of the deceased, his personal property may be considered in abeyance until administration is granted; and is then vested in the administrator, by relation, to the time of the death:" *Jewett v. Smith*, 12 Mass. 309; *Lawrence v. Wright*, 23 Pick. 128. In the case of *Carpenter v. Commonwealth of Pennsylvania*, 17 How. 456, the supreme court of the United States assert the doctrine here maintained. In 1826, the state of Pennsylvania passed a law by which, under certain circumstances, "all inheritance being within that commonwealth" should be subject to a tax. William Short, a citizen of Pennsylvania, died in 1849, leaving certain personal property in New York to citizens in that state. In 1850, the legislature of Pennsylvania passed an act declaring that the prior act of 1826 "should be so construed as to relate to all persons who have been, at the time of their decease, or now may be, domiciled within this commonwealth as well as to estates." The supreme court held that the title to the property in New York did not vest in the devisees there in 1849, but belonged to the executor in Pennsylvania till distribution made, and was, therefore, taxable by virtue of the act of 1850. If personal effects do not vest in devisees under a will upon the death of a testator, they certainly cannot vest in heirs upon the death of an intestate. We conclude in every point of view that the act of our assembly of 1854, before cited, was and is applicable to the distribution of all estates since its passage, without regard to the time of the intestate's decease, and therefore affirm the judgment of the probate court.

Judgment affirmed.

OLNEY, J., did not sit in this case.

LAW CONTROLLING DISTRIBUTION OF ESTATES OF DECEASED PERSONS.—The principal case seems to stand alone in holding that the law in force at the time of the distribution controls. The only other case we have been able to find in which there occurred a statutory change in the law between the death of a party and the distribution of his estate, is *Miller v. Miller*, 10 Met. 303. The facts, briefly, were, that a married woman died intestate, leaving estate in fee, which was held by her husband till his death, as tenant by curtesy. Under the law at the time of her decease, the children would

inherit equally, except that the son was entitled to two shares. But at the husband's death, the law had been changed, so that the eldest son was only entitled to an equal share with the rest of the children. Upon the distribution, the eldest son claimed, and was allowed, two shares, the court holding that the estate must be distributed according to the law in force at the time of the death of the wife, and not according to that in force at the time of the distribution. The California cases, holding that the probate laws of that state have no application to the estates of persons who died before their passage, cannot be considered in point, since by the Mexican law, previously in force, the "heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased." *Coppinger v. Rice*, 33 Cal. 408, and cases cited. In *McGaughy's Adm'r v. Henry*, 15 B. Mon. 383, the general principle is laid down that the laws in force at the time of a testator's death must determine the distribution of any property of which he may have died intestate. The numerous cases holding that the succession to personalty is governed by the law of the domicile of the owner at the time of his death have already been collected in this series: See *Wheeler v. Hollis*, 70 Am. Dec. 363, and note 370.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

WESTERN INSURANCE COMPANY v. CROPPER.

[82 PENNSYLVANIA STATE, 551.]

IF EXCEPTION IN POLICY OF INSURANCE IS CAPABLE OF TWO INTERPRETATIONS, equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the insurers.

UNDER EXEMPTING CLAUSE IN POLICY OF INSURANCE upon the hull, tackle, machinery, and apparel of a steam-propeller, stating that "it is understood that this company is not liable for any breakage or derangement of the engine, or the bursting of the boiler, or any of the parts thereof," the insurers are only relieved from liability to indemnify the assured for broken or deranged machinery, and are not exempt from obligation to pay for a total loss, even though such loss could be traced back to the breaking of the machinery as its first cause.

COVENANT upon a policy of insurance for a total loss by perils of the sea. The opinion states the facts.

M. P. Henry, for the plaintiffs in error.

McCall, for the defendants in error.

By Court, **STRONG, J.** The inquiry raised by the pleadings relates to the extent of the exception inserted in the policy. It is entirely a question of construction. The contract was one of insurance upon the hull, tackle, machinery, and apparel of a steam-propeller, but it stipulates for exemption from liability for certain losses. The stipulation was inserted by the underwriters, and was intended for their benefit. If it be obscure, it is their fault. If it be capable of two interpretations, equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the insurers.

The excepting clause in the policy is in the following words: "It is understood that this company is not liable for any breakage or derangement of the engine, or bursting of the boiler, or any of the parts thereof, or for the effects of fire from any cause connected with the operation of the repair of an engine or boiler, unless the damage be occasioned, and the repairs rendered necessary, by the stranding or sinking of the vessel after her engines and boiler shall have been put in successful operation. It is also understood that this company is not liable for fuel, wages, and provisions, nor for any expense of any delay consequent upon repairs to the engine or boiler, of any kind, or repairs to the hull, if such repairs are rendered necessary by breakage or derangement of machinery, or bursting of boiler."

It is not to be denied that the intention of the parties is far from being clearly expressed in this excepting clause. The controversy, however, is all in regard to the first exception, and we are of opinion that its purpose was only to relieve the underwriters from liability to indemnify the assured for broken or deranged machinery, and not to exempt them from the obligation to pay for a total loss, even though that loss could be traced back to the breakage of the machinery as its first cause. The exemption embraces three kinds of losses: 1. Breakage or derangement of the engine, or bursting of the boiler, or any parts thereof; 2. The effects of fire arising from certain causes; and 3. Fuel, wages, and provisions, and expenses of delay consequent upon repairs to the engine, boiler, or hull, if rendered necessary by breakage of the machinery. If it was the intention of the parties, by the first exemption, to except from the contract of indemnity all losses directly or indirectly consequent upon breakage, it would have been easy to have done so clearly by the insertion of two or three additional words. That the difference between damage, itself a loss, as well as causing one, and the loss caused, was in the minds of the insurers, may be inferred from the fact that by the second exemption they have protected themselves against such consequential losses. They expressly provide against liability "for the" effects "of fire from any cause connected with the operation of [or] the repair of an engine or boiler," but they do not expressly exclude the effects of breakage or derangement of the engine or bursting of the boiler, or any of the parts thereof. The difference in the mode of expression is indicative of a difference of intention.

It is difficult also to account for the additional stipulation contained in the third exception, if the first was designed to embrace all the consequences of breakage of the machinery. In that case, expenses of delay consequent upon repairs to the engine or boiler, or repairs of the hull, rendered necessary by breakage or derangement of the machinery, are twice excluded from the contract. These things are but consequences of breakage. Why stipulate the second time for their exception, if they had already been excepted? No satisfactory reason has been given for it. Parties are not to be presumed to have intended mere repetition. It seems clear that something additional was meant which had not before been excepted. To allow any force to this part of the exempting clause, the first must be construed as extending only to immediate damage to the machinery. And it is a cardinal rule of construction that effect should be given, if possible, to every part of the instrument. The general provisions of the policy cover the whole loss, however occasioned. The underwriters limit the general words by stipulating that they are not to be liable for breakage, nor for expenses of delay caused by breakage, or by repairs consequent upon breakage. The exception itself raises an implication that for all other consequences of breakage not mentioned they were to remain responsible under their general covenant of insurance. This interpretation is consistent with all the provisions of the policy, and leaves no part of it without meaning.

Judgment affirmed.

INSURANCE POLICIES ARE LIBERALLY CONSTRUED in favor of the assured, and exceptions therein are strictly construed against the underwriter: *Grant v. Lexington etc. Ins. Co.*, 61 Am. Dec. 74, and note 81. See also note to *Morrison's Adm'r v. Ins. Co.*, 59 Id. 304. When a stipulation or an exception to a policy of insurance, emanating from the underwriters, is capable of two interpretations, the one is to be adopted which is most favorable to the assured: *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 292; *Franklin Fire Ins. Co. v. Uptegraft*, 43 Id. 359; *McClure v. Watertown Ins. Co.*, 90 Id. 280; *Teutonia Ins. Co. v. Mumf.*, 102 Id. 94; *Burkhard v. Travellers' Ins. Co.*, Id. 266. The above rule applies to the conditions contained in the by-laws of the insurance company: *Buckley v. Garrett*, 47 Id. 209, all citing the principal case.

LIABILITY OF COMPANY UNDER EXEMPTION IN POLICY, that the insurers shall not be liable for the breaking of machinery under certain conditions: *Berliner v. Eagle Ins. Co.*, 69 Am. Dec. 308. See also on this subject, generally, note to *Hullier v. Allegheny etc. Ins. Co.*, 45 Id. 657.

POWELL v. PENNSYLVANIA RAILROAD COMPANY.

[32 PENNSYLVANIA STATE, 414.]

PARTY WHO OBSTRUCTS TRACK, OR INTERFERES WITH TRANSPORTATION of a railroad company, cannot recover for an injury received.

RAILROAD COMPANY IS BOUND TO TRANSPORT SAFELY, or to respond in damages, except when the injury has resulted from the act of God, or the concurring negligence of the party complaining.

RAILROAD COMPANY IS BOUND TO EMPLOY ALL NECESSARY OFFICERS AND AGENTS, and to instruct them in their respective duties, so as to secure to the public a safe transportation.

PUBLIC IS ENTITLED WITHOUT DISTINCTION TO TRAVEL UPON RAILROADS, but it is entitled to do so only in a particular manner, and in vehicles controlled and managed by the company. This control and management extends to every part of the service.

RELEASE SIGNED BY SHIPPER EXONERATING RAILROAD COMPANY from liability for injury sustained to live-stock during transportation does not excuse negligence on the part of the company.

IT IS NEGLIGENCE ON PART OF RAILROAD COMPANY to allow straw to be used in its cars for bedding; and if a fire occur from such use, occasioning the loss of live-stock while being transported, the company is liable for all loss sustained by the shipper.

CASE. The opinion contains the facts.

Speakman, for the plaintiff in error.

Cuyler, for the defendants in error.

By Court, **WOODWARD, J.** Whoever has been attentive to the course of decision in this court for the last few years, on questions between railroad companies and those whom they have injured in person or property, cannot have failed to observe that on the one hand we accept no excuse from the party who obstructs the track or interferes with the transportation of the company, and on the other, that we hold companies bound to transport safely, or to respond in damages, except where the injury has resulted from the act of God, or the concurring negligence of the party complaining. *Railroad Co. v. Skinner*, 19 Pa. St. 298 [57 Am. Dec. 654], *Railroad v. Norton*, 24 Id. 466, and *O'Brien v. Philadelphia etc. R. R. Co.*, 15 Leg. Int. 65, S. C., 3 Phila. 76, are instances of ruling upon the first branch of the alternative; whilst there are many cases that belong to the second branch: *Sullivan v. Philadelphia etc. R. R. Co.*, 30 Pa. St. 234 [72 Am. Dec. 698]; *Goldrey v. Pennsylvania R. R. Co.*, Id. 242 [72 Am. Dec. 703]; *Reeves v. Delaware etc. R. R. Co.*, Id. 454 [72 Am. Dec. 713]; *Rauch v. Lloyd*, 31 Id. 358 [72 Am. Dec. 747]; *Pennsylvania R. R. Co. v. Kelly*, Id. 372.

The ground of these adjudications is, that railroads, though in some sense public highways, like turnpike roads, are committed by law to the management and control of corporations, who are bound to employ all necessary officers and agents, and to instruct them in their respective duties so as to secure to the public a safe transportation. The public, while entitled without distinction to travel upon railroads, are entitled to do so only in a particular manner, in vehicles controlled and managed by the company; and of the control and management of which, it would seem, the company are not allowed to divest themselves, even for the purpose of giving them up to another company: Angell's Law of Highways, sec. 370; and *Beman v. Rufford*, 6 Eng. L. & Eq. 106.

And this control and management of the cars extends to every part of the service; the receiving and discharge of passengers, and the loading and unloading of freight, as well as to the making up of trains, and conducting them over the road. In *Reeves v. Delaware etc. R. R. Co.*, 30 Pa. St. 464 [72 Am. Dec. 713], it was said the company are bound to employ all necessary agents, to instruct them properly in their duties, and to look to them for the performance of every act which the business of the road requires.

These principles are not more necessary for the safety of the public than for the prosperity of railroad companies. If every man were permitted to occupy and use the tracks of railroads according to his own fancy or interests, or to dictate how cars should be loaded and arranged in the train, confusion and disaster, involving loss of life and injury to person and property, would ensue as inevitable consequences. The agents in charge at shipping points are presumed to know, better than freightmen and drovers, how many dumb beasts ought to be put into a car, and what arrangements are necessary to be made for their comfort and safety; and it is due alike to the animals and the owners, that the skill and experience of the agents should dictate everything that pertains to the taking on, the carrying, and the discharge of the load: *Ritz v. Pennsylvania R. R. Co.*, 15 Leg. Int. 75; S. C., 3 Phila. 82.

With these principles before us, let us look at the case upon the record. The plaintiff applied to the company's shipping agent at Pittsburgh, for the transportation of a young and valuable mare to Philadelphia. Two witnesses swear that the plaintiff asked for tan for bedding for the mare, and that the agent told him he could not get tan, but said he could get

plenty of straw, and directed him where straw was kept for sale. The straw was obtained and put into the car in the presence and without objection from the agent. On the way it took fire by sparks from the engine and burned the mare, if not to death, so badly as greatly to impair her value.

The agent swears that the company have a positive rule that shippers are not to use straw except at their own risk. He does not recollect the conversation sworn to by the other witnesses; but that he "must have said that if they used straw it would be at their own risk."

The plaintiff signed a release of the company from any and all claims for damage or injury to his stock while in the company's cars.

Upon these facts, the plaintiff's counsel requested the court to charge that if there was liability to fire from sparks from the locomotive, it was negligence for the company to permit straw or other combustible materials to be used in the cars; and if the jury find the fire originated from that cause, the company are liable.

The refusal of the court to affirm this proposition is the only error assigned.

The ruling of the learned judge cannot be justified on the ground of the release signed by the plaintiff, because that has been held to be no excuse for negligence: See *Goldey v. Pennsylvania R. R. Co.*, 80 Pa. St. 242 [72 Am. Dec. 703], and cases therein cited.

Was it negligence, then, to permit straw to be used? The result proves that it was. The plaintiff's point was dependent on the contingency that the fire originated from that cause—the use of the straw—and as the court refused to submit this question, we must presume it would have been found as the plaintiff assumes the fact to be.

A fire resulting from the use of straw proves the impropriety of such use, and the rule of the company proves it also. The agent swears to the rule, but he brings home no notice of it to the plaintiff, except by his argumentative conclusion that he "must have said if they used straw it would be at their own risk."

So far from this conclusion being accurate, the testimony of the other witnesses shows that the agent encouraged the plaintiff to obtain straw, and permitted him to use it without any proclamation of the rule that forbade it.

The existence of such a rule is evidence that the experience

of the company had established the danger of using straw for bedding. And yet their agent stood by and suffered straw to be used without disclosing the danger, or pleading the rule, and thereby subjected the mare to the dreadful tortures described in the evidence, and the plaintiff to the loss of which he complains.

Such is this case upon the record. It was a case of flagrant negligence. For what is the company's agent there, but to prescribe the bedding for animals shipped on board of their cars, as well as to superintend all the preparations for the trip? The cars are theirs—under their exclusive control, and they are bound to see that they are roadworthy in all respects. A defective wheel, or axle, or frame-work, would confessedly render them liable, even as against the release. The carrying of a combustible article so near the engine as to be exposed to sparks was even more inexcusable; for this could not escape observation, as defects in the vehicle might. To attend to nine things and neglect the tenth was to be guilty of the whole law. They were to take every precaution which prudence, diligence, and experience could reasonably suggest. It was for this the law gave them their charter and their right to be public transporters. Their business will become a snare for the unwary, and an intolerable nuisance in the community, if they be not held to the conditions they have assumed—if they may perform part of their duties and turn over the rest to be performed by ignorance and inexperience, disasters will become almost as frequent as trips.

And when it is considered that the company itself generally suffers as much loss by each disaster as those whom it injures, it is obvious that the best interests of the company, as well as of the public, demand a strict observance of the rules and principles of law that are applicable to their business.

We are of opinion that, upon the facts presented, the plaintiff's point should have been affirmed.

The judgment is reversed, and a *venire de novo* awarded.

RAILROAD COMPANIES AND COMMON CARRIERS are insurers against all loss except that arising from an act of God or the public enemy: *Norway Plains Co. v. Boston etc. R. R.*, 61 Am. Dec. 423; *Ferguson v. Brent*, 71 Id. 582, and notes to these cases. But they are not liable when there has been negligence on the part of the party complaining: *Galena etc. R. R. Co. v. Fay*, 63 Id. 223, and citations in note 233.

RAILROAD COMPANY IS BOUND TO EMPLOY competent and skillful agents and servants, and is liable for their negligence: *Gillemwater v. Madison etc.*

R. R. Co., 61 Am. Dec. 101; *Vicksburg etc. R. R. Co. v. Patton*, 66 Id. 552, and note 574; and the company cannot repudiate the acts of its agent so as to exonerate it from liability for his negligence: *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 330; *Lackawanna etc. R. R. Co. v. Chenoweth*, 52 Id. 335; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Id. 250, all citing the principal case.

RIGHT OF RAILROAD COMPANY TO MAKE REASONABLE REGULATIONS: *Commonwealth v. Power*, 41 Am. Dec. 465, and extended note 471-486; *Day v. Owen*, 72 Id. 62; *Sullivan v. Philadelphia etc. R. R. Co.*, Id. 698. Railroad company may make reasonable rules and regulations for its own protection, and for the safety and convenience of passengers: *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 27, citing the principal case.

NEGLECTANCE CANNOT, BY CONTRACT, BE MADE EXCEPTION TO THE CARRIER'S LIABILITY: *Graham v. Davis*, 62 Am. Dec. 285, and note 294.

THERE ARE SOME CASES in which a court can determine that omissions constitute negligence, and when a duty is defined, a failure to perform it is negligence: *Empire Transportation Co. v. Wamsutter Co.*, 63 Pa. St. 17.

BILES v. COMMONWEALTH.

[32 PENNSYLVANIA STATE, 529.]

FALSE AND FORGED ENTRY IN JOURNAL OF FIRM, made by their confidential clerk and book-keeper, with intent to defraud his employers, constitutes forgery. Such forgery may consist in the false addition of one figure in the amount of cash received from bills receivable.

FORGERY. The opinion states the facts.

Remak, for the plaintiff in error.

S. C. Perkins, and *Loughead*, district-attorney, for the commonwealth.

By Court, READ, J. The defendant was the confidential clerk and book-keeper of Hoskins, Hieskell, & Co., and he was indicted and convicted of having made a false and forged entry in the journal of the said firm, with intent to defraud his said employers. The forgery consisted in a false addition of one figure in the amount of cash received from bills receivable, in the month of August, 1856, and in the alteration of another true figure in said addition. The true addition was \$6,455.63, while the false addition was \$5,955.63, the first figure 5 being an alteration of the original figure in the addition, which was a 6. The result of this forgery was to represent the cash received five hundred dollars less than the actual amount; and, of course, to enable their clerk to abstract that sum from the funds of the firm.

The three principal books of a mercantile house are the day-

book, journal, and ledger. The ledger is the chief or grand book of accounts, to which all the others are subservient. It is the principal book of accounts among merchants, into which the accounts of the journal are carried in a summary form. A false entry in the day-book necessarily produces a false entry in the journal and ledger; whilst a false entry in the journal results in a corresponding false entry in the ledger in a condensed form.

In this case, the ledger, which is the book consulted for the state of the accounts, would represent the cash received from bills receivable in the month of August, 1856, as five hundred dollars less than the true amount.

The facts of the forgery have been found by the jury, and that it was done with intent to defraud this firm of Hoskins, Hieskell, & Co.

We have read carefully the very able opinion of the court below, and the whole subject has been exhausted in the very elaborate written and oral arguments before us. With all these lights, we are unable to see that this false entry does not amount to forgery, and one of the most dangerous character to the community. For if false entries in the books of a mercantile firm can be made by a confidential clerk and book-keeper with impunity, then all confidence in their accuracy must be destroyed.

The writing, which is the subject of forgery, may be one by which a private fraud is attempted or done, or one tending to a public fraud or other public injury. It must be legally capable of effecting a fraud. "In respect to private writings," says Mr. Bishop, in his Commentaries on Criminal Law, vol. 2, sec. 438, "it is immaterial by what name they go, and whether they are under seal or not, provided they have the other requisites. Thus a bond or other deed; a bill of exchange or promissory note; a check; an assignment of a legal claim, or a power of attorney to collect it; an indorsement of a promissory note; an indorsement of a payment; a receipt or acquittance; a letter of credit; a transfer of credit; a transfer of stock; an order for the delivery of money or goods; an acceptance of a bill of exchange, or of an order for the delivery of goods; an affidavit, in England, for the purpose of obtaining money due to an officer's widow from the treasurer of the queen's bounty; a private act of parliament; a copy of any instrument, which copy is to be used in evidence in the place of a real or supposed original; a testimonial of character, as a

school-master or otherwise; and many other such things—are instruments of which forgery can be committed.”

So in *Queen v. Moah*, 27 L. J. Mag. Cas. 204, it was held that forging a letter of recommendation of himself to the chief constable, for the office of police constable, was forgery at common law. And in *Queen v. Griffith*, Id. 205, where a station-master employed by a railway company to pay the carrier who delivered and collected parcels, told the carrier falsely that the company would not pay him for delivery, in which he acquiesced; the station-master had printed forms for delivery and collecting, which he had to fill up and return; on the right-hand side, under the head “collecting,” was written “rec’d,” which was signed by the carrier’s servant; and he paid him thirteen pounds for collecting, but the delivery, amounting to twenty-six pounds, he kept himself; after the receipt was written, the station-master put a receipt-stamp under the name of the servant, and on it put in figures, “£39,” the aggregate of both columns;—it was held that the prisoner was guilty of forging the receipt.

We perceive, therefore, that the crime of forgery, at the present day, extends to a large number of subjects which were not in existence in the earlier periods of the criminal law, and some of which had their origin in the present century. It is, therefore, no argument to say, that precisely such a case as the present is not to be found in the books, although the writing forged is covered by all the definitions and descriptions of the crime of forgery.

The industry of the counsel of the commonwealth has, however, furnished us with a copy of the indictment in the case of Nicholson, who was convicted in 1841, in the court of general sessions for the city and county of Philadelphia, of forging an entry in the day-book of his employer. He was defended by two of our ablest lawyers, Messrs. J. R. Ingersoll and F. W. Hubbell, who, after his conviction, moved in arrest of judgment, but the motion was overruled, and the defendant sentenced. The form of the indictment is similar to the present one. No writ of error was ever taken, and it remains a direct decision of a court of criminal jurisdiction upon the very point now before us.

We are, therefore, of opinion that the offense is properly set forth in the indictment, and that it is forgery at common law.

Judgment affirmed.

FALSE ENTRIES IN PASS AND ACCOUNT BOOKS AS CONSTITUTING FORGERY.—This question has been treated at considerable length in a copious note to *Arnold v. Cost*, 22 Am. Dec. 312, 313, and on page 321 other instances will be found of accounts which may be the subject of forgery: See also *Barnum v. State*, 45 Id. 601. The note above cited contains nearly all of the cases which are to be found on the subject, but as some late authorities have been found in which the question is involved, they will be here given. An interesting case is that of *In re Tully*, reported in 20 Fed. Rep. 812, S. C., 5 Crim. Law Mag. 913, S. C., 18 Rep. 263, where it is held that false entries made in the usual books of account, or memorandum on slips directing such entries by others, made by an officer or employee of a bank for the purpose of concealing his embezzlements, do not constitute forgery, as defined and recognized by the courts of England; and where a party is held for extradition to such country under the Ashburton treaty for forgery, on proofs of acts committed there, he should be discharged. The facts in this case were as follows: Tully was submanager of the Preston Banking Company, Limited, and authorized to draw checks upon its agents in reducing business. The practice in vogue was to fill out a printed memorandum, termed a "blue slip," showing the amount drawn, from whom, and how the proceeds were disposed of. Tully signed these slips with the letter "P," which stood for his signature and authentication of the transaction stated in such memorandum. The blue slips were then handed to the accountant's desk, and the proper entries were then made in the books of the bank, the slips being preserved as vouchers. Tully drew checks in this manner for various sums of money, appropriated the same to his own use, and returned blue slips to the accountant's department, and then absconded. Brown, J., in delivering the opinion of the court, said: "As respects the blue slips, if I were at liberty to consider the question presented in connection with the law of evidence prevailing in this state [New York] as an original one, I should be inclined to hold they might possibly constitute forgery at common law, on the ground that under the usage of the bank, and the course of dealing, these blue slips, as between Tully and the bank, when supplemented by his own oath as correct entries made at the time of the transaction, and in the course of his official duty, might, in the absence of his own recollection, become evidence admissible under our rule, in his favor, of an investment by him of the moneys he had received as stated in the slips, and hence tending to show an acquittance to him therefor as against the bank; that these slips were precisely equivalent to entries in the books of the bank by Tully, and of the same effect as if it had been the practice for him to make entries in the books of the bank, instead of rendering the blue slips for the purpose of such entries by others."

In support of this doctrine the principal case is cited, and the learned jurist then proceeds to say, in effect, that when such entries are falsely and fraudulently made, in order to conceal embezzlements, they might well be held to be forgery, as entries falsely made to the prejudice of the bank. This view of the law is undoubtedly sound, under the ruling in *People v. Phelps*, 49 How. Pr. 426, S. C., 72 N. Y. 365, where the prisoner was convicted of forgery, upon proof that he made a false entry in a ledger under his control as cashier or clerk in a public office, such entry being made for the purpose of deceiving and defrauding his employers. But he proceeds as follows: "For the purposes of this hearing, however, on a claim of extradition by the British government, I am precluded from passing upon this as an original question, in connection with the rule of evidence prevailing here, because this transaction was in England, where a different rule of evidence seems to prevail; I refer

to the case of *Windsor*, 6 B. & S. 522." The latter authority is cited in the note to *Arnold v. Coet*, 22 Am. Dec. 313. A case identical with that of Talley's, *supra*, in essential particulars, is that of *In re Eno*, reported in Spear on Extradition, 276, S. C., 30 Alb. L. J. 144, where the same ruling is held to prevail in favor of an American citizen sojourning in Canada, but held for extradition because of embezzlements, committed in New York, by falsifying the account-books of the Second National Bank of New York city, while he was acting as president of that institution. On the other hand, we find other Canada cases maintaining, and, as we think, with better reason, an exactly contrary doctrine. *In re Jarard*, 4 Ont. 265, is a case where the prisoner was a collector for the county of Middlesex, New Jersey, and kept a book in which to enter the payments and receipt of money received by him as such officer. This book was the principal book of accounts kept by him, and after it had been examined by the proper auditors as to the amounts received and paid out by and through the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter, with intent to cover up his defalcations, altered the book by making false entries therein of money received and paid out, and changing the additions to correspond. Wilson, C. J., in delivering the opinion of the court, says: "I entertain no doubt whatever that the acts alleged against the prisoner are acts of forgery, at common law; and in my opinion, they are, as entries in his account between the prisoner and the county of which he was collector, acts of forgery by our statute; and according to the evidence, they are acts of forgery according to the law of New Jersey." And again in *Hall's Case*, 8 Ont. App. 31, S. C., 32 U. C. C. P. 498, it is held to constitute forgery where the crime charged consists in the fraudulent alteration of the cash-book and accounts of the comptroller of the city of Newark, New Jersey, whereby the account, purporting to be the amount of cash received, is so falsified and altered as to enable the prisoner to embezzle a large sum.

Under section 2582 of the Mississippi code, which makes it forgery to fraudulently alter an entry in any book of accounts kept in a public office, a city assessment roll is such book of accounts and the subject of forgery: *Turbeville v. State*, 56 Miss. 793. So under the general statutes of Massachusetts, chapter 162, section 1, an accountable receipt for money may be forged by fraudulently increasing the amount named therein: *Commonwealth v. Boutwell*, 129 Mass. 124; and see also *Commonwealth v. Butterick*, 100 Id. 12; and again in *State v. Marvell*, 47 Iowa, 454, the crime charged was forgery, with intent to defraud of a receipted account for a debt of seventeen dollars and fifteen cents; from the facts it appears that one Gliessendorf held an account against defendant for ten dollars and ninety cents; defendant claimed that it was paid, and presented the receipted account alleged to be forged as evidence of payment. In an action upon the claim, defendant set up payment as a defense, supported by the receipted account, and claimed that it was given upon a settlement of the same claim sued upon. It was proved that prior to the time when the indebtedness was contracted, defendant was indebted to Gliessendorf to the amount of seventeen dollars and fifteen cents, and the account charged to have been forged was made out and presented to defendant as representing the items of the first indebtedness. The account was paid, receipted, and signed in the name of Gliessendorf by his clerk; but no date of payment was written on the receipt. Defendant afterwards wrote the date of payment upon the receipt, so as to make it appear that payment was made after the date of the last item of the claim sued upon. The forgery consisted of this alteration, and upon the evidence defendant was convicted. Where a

check has been signed with specific instructions to use it for a certain purpose, if the party receiving it fills it up for a different purpose and converts the money drawn upon it to his own use, this constitutes forgery under Wagner's Missouri statutes, 470, sec. 16: *State v. Kroeger*, 47 Mo. 552. It is forgery for one party when authorized by another to fill up a check with a certain amount to fill it up with a larger sum, and the circumstance that the prisoner alleges a claim for the larger sum due him as salary from the party authorizing him to fill up the check makes no difference and is immaterial: *Regina v. Wilson*, 1 Den. C. O. 284; S. C., 2 Car. & Kir. 527; S. C., 2 Cox Crim. Cas. 426. An entry of the receipt of money or notes made by a cashier in the bank-book of a creditor of the bank is an accountable receipt for the payment of money within the statute, and altering the principal sum by prefixing a figure to increase its numerical value is a capital forgery: *Rez v. Harrison*, 1 Leach C. C. 180.

It has been decided in New Hampshire that it is not forgery, either at common law or under the state statute, for one to make a false entry in his own book of accounts: *State v. Young*, 46 N. H. 266. In the opinion in this case, the principal case is cited, and no question raised as to the soundness of the doctrine laid down, but a distinction is drawn between the criminality of one who makes a false entry in his account-books and another who makes such entry as the agents of others, and perhaps the decision in the New Hampshire case may be traced to the peculiar structure of the statute, for Sargent, J., says: "In examining our statute, it will be seen that almost every form of writing or instrument known to the law is specifically enumerated as the subject of forgery, but no mention is made of accounts, or books of account. It is not probable that if the law was intended to apply to so common a thing as accounts, they would have been mentioned with the other writings specified." As between the principal case and *State v. Young*, *supra*, Mr. Bishop says that in principle "the question as to the true distinction between the altering of a book of accounts and the making of a false original entry may be stated thus: In order to render a false entry or alteration in such a book forgery, it must purport to be what it is not, and to be of legal validity. If one fraudulently alters a book of accounts, whether originally kept by himself or by another, it ceases to be what it purports; namely, the actual record of transactions made when they occurred. Therefore he commits forgery. But if he simply enters a false charge against one, he does not thereby substitute a false record for the true original, he merely creates an original record which is not true in fact. To do this is not forgery:" 2 Bish. Crim. L., sec. 586. The rule of law laid down in the principal case maintains in Pennsylvania. In *Commonwealth v. Beamish*, 81 Pa. St. 389, it is held that a party may be convicted of forgery under an indictment charging that defendant, as secretary of a board of school directors, did, with intent to defraud, alter, mutilate, and falsify a certain book and writing, commonly known as the duplicate of taxes levied for the use of a school district. And in *Commonwealth v. Lueberg*, 94 Id. 85, a teller of a national bank was convicted in the state court upon an indictment charging him with fraudulently making false entries, reports, and statements of the bank, with intent to injure and defraud it. Both of these cases hold that the offense charged was forgery at common law.

PHILADELPHIA AND SUNBURY R. R. CO. v. LEWIS.

[38 PENNSYLVANIA STATE, 32.]

CORPORATION HAS POWER TO CARRY ON ITS LEGITIMATE BUSINESS by all legal and necessary means not prohibited by law or by its charter.

BONDS OF RAILROAD COMPANY ARE NOT MADE VOID BY BEING SECURED BY MORTGAGE which the company had no power to execute. Nor is the holder's right to recover on such bonds at all affected by a memorandum thereon that they were issued by the company in accordance with its charter, and that the mortgage therein recited had been duly executed.

BONA FIDE PURCHASER OF LANDS OF RAILROAD COMPANY IS NOT BOUND TO SEE TO APPLICATION of the money paid for them to the purposes of the corporation, where the bonds are in such form as to pass by delivery. Nor is it any defense to an action on such bonds that the books of the company do not show value received for them, or that the president of the company has not made to it a return of the proceeds.

RESERVATION OF ILLEGAL RATE OF INTEREST DOES NOT PREVENT RECOVERY of the principal and legal interest thereon.

DEBT. The opinion states the facts.

Lex, for the plaintiffs in error.

Parsons, for the defendant in error.

By Court, THOMPSON, J. This was an action of debt, brought by the plaintiff below against the company, on twenty bonds of five hundred dollars each, amounting to ten thousand dollars, together with the amount due on the coupons thereto attached, all dated the ninth day of June, 1856. The first interest was to fall due on the fifteenth day of June, 1857, and semi-annually thereafter.

There was a mortgage given at the time of the execution of the bonds, on the property and lands of the company to secure their payment, in which it is stipulated "that if default be made in the payment of the interest on the said bonds for ninety days after the time appointed for the payment, the principal sum of the said bonds shall become due and payable, as if the time appointed for the payment thereof had actually arrived." Default having been made in the payment of interest, this suit was brought, and copies of the claim filed.

To prevent judgment being had, the president of the company made and filed an affidavit of defense. The judge at *nisi prius*, on motion, directed judgment to be entered against the defendants, on the ground of its insufficiency, and this is the only error assigned on this record.

The matters alleged in the affidavit, and relied on as a defense, are: 1. That the company had no authority to issue the

bonds, and from a memorandum on the bonds themselves, the plaintiff knew, or had the means by inquiry of knowing it; 2. That the books of the company did not show that any value had been received by the company for the bonds; that the said bonds had been delivered to the then president of the company, whose accounts remained unsettled, and that he had made no return of the proceeds of the bonds to the company; 3. That the rate of interest (twelve per cent) which the bonds bear is illegal.

1. The plaintiffs in error seek to establish the point that these bonds are void because the company had no power to create the mortgage accompanying the bonds; and thus, as the accessory was inefficient, the principal was void. In other words, as the power of the company had been exhausted, to pledge by mortgage the franchises and property of the company, they were not bound to fulfill their obligations created by these bonds. It is a well-known principle of law, that a corporation, like a natural person, has the right to carry on its legitimate business by all legal and necessary means not prohibited by law or by its charter. "That it has at least," says Kennedy, J., in *Dana v. Bank of the United States*, 5 Watts & S. 223, "every capacity that is necessary to carry into effect the purposes for which it was established, cannot well be questioned." This principle has been repeatedly asserted by this and other courts, and in view of it, why had not the Philadelphia and Sunbury Railroad Company a right to issue their bonds in the form of those in question? We have nothing to do with the mortgage in the investigation of this question; that is another thing. It may be that it will not affect the security intended; we do not know, and give no opinion in regard to it. But would this be a reason why the bonds should not be binding? It often has and often will occur, that mistakes and defects in mortgages have rendered them worthless as securities, but nobody ever presumed that the bond was therefore to have no obligatory force. The power to issue the bond is all we have to do with. In *McMasters v. Reed*, 1 Grant Cas. 36, it was strenuously urged, that, as the legislature had conferred on the Erie Canal Company a power to borrow money on mortgage to enable them to complete their work, this covered the whole scope of power possessed by the company, and they could not issue bonds without such mortgage. But they did not think so, and issued bonds payable to bearer without any

accompanying mortgage. It was insisted that, as this was unauthorized, the parties executing the bonds made themselves personally liable. But this court held that the company had of necessity the right to enter into obligations in carrying out the ends of their creation, and that the obligations were binding upon the company. The last case on this subject affirming this doctrine is *Fritz v. Holy Trinity Church* [not reported], decided at this term. We have no doubt the company had a right to issue the bonds, and are liable upon them without regard to the mortgage. Nor do we think that the memorandum on the bonds, that they were issued by the "company, in accordance with its charter, to the amount of five hundred thousand dollars, and that the mortgage therein recited had been duly executed" and delivered to the trustees, had any effect whatever in this case prejudicial to the plaintiff's right of recovery. What effect it may have when the mortgage comes to be tested we cannot say. Thus far, the affidavit of defense was insufficient.

2. It was not sufficient to allege that the books of the company did not show value received for the bonds, or that the president had not made a return of the proceeds to the company. The bonds were in such form as to pass by delivery; a purchaser had simply to pay his money and take his bond. He was not bound to see to the application of the money to the purposes of the corporation. He might presume that they had sufficiently provided for their own safety in that matter. The allegation is not that the bonds were obtained fraudulently and without being paid for, nor that they were not in fact paid for to the proper officer or officers of the company, but only that the books do not show what had become of the proceeds. This was clearly insufficient.

3. The third matter of defense is as to the illegality of the interest. This does not avoid the bond: *Wycoff v. Longhead*, 2 Dall. 92; *Turner v. Calvert*, 12 Serg. & R. 46, and many cases since. This being so, the courts in this state have always held that a recovery might be had for the principal and legal interest on usurious paper. This is too well settled to admit of elaboration. The plaintiff below relinquished the excess of interest, and only claimed payment for the principal of their bonds and coupons, with six per cent interest. This he was entitled to. We see no error in the case; and the judgment is affirmed.

POWERS OF CORPORATIONS: See *Abby v. Billups*, 72 Am. Dec. 143, note 143.

COUPON BONDS, NEGOTIABILITY OF: See *Morris Canal and Banking Co. v. Fisher*, 64 Am. Dec. 423, note 423, where this subject is discussed.

USURIOUS CONTRACT, PRINCIPAL AND INTEREST RECOVERABLE ON: See *Baughner v. Nelson*, 52 Am. Dec. 694, note 702.

PURCHASER OF CORPORATION BONDS IS NOT BOUND TO SEE TO APPLICATION of the money to the purposes of the corporation issuing them: *Justice v. Stroup*, 4 Phila. 348, citing the principal case.

CORPORATION BONDS ARE CAPABLE OF PASSING BY DELIVERY, so as to enable the holder to maintain an action thereon in his own name: *Mason v. Frick*, 105 Pa. St. 163, citing the principal case.

MERCHANTS' INSURANCE COMPANY v. DE WOLF.

[23 PENNSYLVANIA STATE, 46.]

ACTION OF DEBT LIES ON FOREIGN JUDGMENT, notwithstanding it has been appealed from, where the judgment may be executed in the jurisdiction where it has been rendered.

ACTION ON FOREIGN JUDGMENT IS ORIGINAL INDEPENDENT ACTION, and the judgment therein is conclusive, unless on a reversal of the first judgment the defendant be awarded a right to *audita querela*, or a writ of error *coram nobis* to have the court below reverse its own proceedings, and award restitution, as the case may require.

DEBT on a judgment obtained by the plaintiffs against the defendants in the superior court of the city of New York. To the declaration, the defendants pleaded *inter alia*, "that after the entry of the said supposed judgment in the said declaration mentioned, and prior to the institution of this present suit, to wit, on the ninth day of July, in the year of our Lord eight hundred and fifty-eight, the said defendants did duly enter and take an appeal from the said judgment from the said superior court of the city of New York, to and into the general term of the said superior court of the city of New York, which said appeal is still in full force and depending, and undetermined." The court below sustained a general demurrer to this plea. The other facts are stated in the opinion.

Guillou, for the plaintiffs in error.

H. Wharton, for the defendants in error.

By Court, LOWRIE, C. J. The forms of the obsolete English action of debt on judgment in the same court can hardly be deemed binding in such a case as this: 7 Vin. Abr. 351; 20 Id. 67. The main purpose of that action was to revive a judgment after a year and a day: *Anonymus*, Holt, 196; and its place is

now supplied by the process of *scire facias*. Indeed, the action of debt on such a judgment, though in form an original action on a new original writ, came to be treated as a mere supplement to the former record and dependent on it; for by a reversal of the first judgment, the second was treated as annulled: *Creamer v. Humberston*, 2 Keb. 520. That class of cases might help us in working out the rule, that a writ of error, though staying execution, does not prevent a *scire facias* to revive a judgment or continue its lien; but they cast little light on the right of action here, on a judgment in a subordinate court of another state, after an appeal entered to a higher court.

In strict form, a *scire facias* is a continuation of the same record, and no independent judgment is entered on it; and therefore, a writ of error that reverses the principal judgment sweeps away all that follows it. There is, therefore, no necessity to treat a writ of error as preventing a proceeding by *scire facias* to revive a judgment, if the objection that the record is gone to another court can be got over; and certainly a writ of error does not entirely remove the record, so as to prevent all proceedings.

Here the action of debt on a foreign judgment is an original and independent action, and no judgment that we may render on it can be affected by any proceedings elsewhere; for those proceedings cannot set aside or confirm what we may do. Our judgment is final, and a writ of error to it does not bring up the proceedings elsewhere on an appeal or writ of error to the first judgment. If, then, we enter judgment, it must be conclusive, unless we leave it to be set aside or stayed, or enforced at the discretion of the court below, on which proceeding a party has no right of review; or unless we say that on a reversal of the first judgment, the defendant shall have a right to *audita querela*; or, perhaps, to a writ of error *coram nobis*, to have the court below reverse its own proceedings and award restitution, as the case may require. Both of these forms of proceeding are allowed in our practice, though seldom used, and therefore the parties may resort to them, if they do not think proper to abide by the discretion of the court below. Perhaps the new fact might be put upon the record without this form. We know not why the parties may not agree to it.

It seems to us, therefore, that we may treat this judgment in New York as the ground of an action here, though it has been appealed from. A writ of error here does not stay proceedings on a judgment unless proper bail be entered, and it

may still be executed as a judgment, subject to restitution in case of reversal. This rule gives us the principle of the present case.

In New York, an appeal takes the place of a writ of error, just as it does in *nisi prius* cases with us. In New York, an appeal does not stay proceedings without bail, or a special order of the court, or a judge thereof; and where this is wanting, we must treat the judgment as a ground of action here, because it may be executed there.

The appeal is pleaded in bar without any allegation that the proceedings were stayed by it; and therefore it does not answer the action. Even if the appeal had operated as a stay, perhaps the plea ought to have been in abatement, but we are not required to decide this. Possibly either might be a good answer to a judgment which furnishes no ground of action as it stands at the time.

Judgment affirmed, and record remitted.

THOMPSON, J., did not sit at the hearing, having been of counsel in the cause.

SUIT LIES ON FOREIGN JUDGMENT APPEALED FROM, but not superseded, the judgment being left to be set aside or stayed by *audita querela*, or writ of error *coram nobis*, in case of reversal of the original judgment: *Davidson v. Smith*, 1 Biss. 352, citing the principal case. The principal case is also cited in *Fuber v. Hovey*, 117 Mass. 108, to the point that an action lies on such a judgment, when, by the law of the state where it was rendered, the appeal does not have the effect to stay execution.

HELFRICH v. COMMONWEALTH.

[33 PENNSYLVANIA STATE, 66.]

ADULTERY MEANS SEXUAL INTERCOURSE BY MARRIED PERSON with any person not his or her wife or husband. A married man may, therefore, be guilty of adultery with a single woman.

INDICTMENT FOR ADULTERY IS SUFFICIENT, which charges that the accused, having a wife in full life, whom it names, did commit adultery with a woman bearing a different name from that of his wife, without otherwise alleging carnal knowledge, and without averring that the person with whom the crime was committed was not his wife.

INDICTMENT for adultery, which charged that the defendant, being a married man and having a wife, to wit, Mary Ann Helfrich, in full life, did commit adultery with a certain Matilda Moyer. The defendant was convicted in the court below, and moved in arrest of judgment on the grounds that the in-

dictment did not charge that he had carnal knowledge of the body of Matilda Moyer, that it did not charge that Matilda Moyer was a married woman, and that it did not charge that Matilda Moyer was not the wife of the defendant. The motion was overruled, and the defendant sued out a writ of error.

Reeder and Brown, for the plaintiff in error.

Marx and Maxwell, for the commonwealth.

By Court, LOWRIE, C. J. We are not convinced by the learned argument of the defendant's counsel. Our statute of 1705 makes fornication and adultery punishable; but it does not define them. Why? Evidently because the words were so well understood that a definition was not thought of. They are also used without definition in the act of the same year against incest: 1 Smith's Laws, 26. And adultery is so used in the divorce laws of 1785 and 1815; 2 Id. 243; 6 Id. 287. It is almost defined, as to a married man, in the act of February 22, 1718, 1 Id. 100, where "live in adultery" is defined "cohabit unlawfully with another woman." The same meaning is shown when it is declared that a husband, marrying on a false rumor of his wife's death, "shall not be liable to the pains of adultery:" 2 Id. 345.

Indeed, we understand the counsel as admitting that long before the act of 1705, through the ecclesiastical courts and otherwise, the words "adultery" and "fornication" had acquired a definite meaning, applying to acts of married and unmarried persons respectively; but they argue that this meaning is illegitimate, and had grown up improperly so far as relates to the act of a married man with a single woman; and to prove this, they refer to the loose marriage relations, and to the low condition of woman in ancient times.

Suppose we admit the change of meaning in the word; this does not prove that the change was improper. Virtue (*virtus*) once meant only manliness, and yet that falls far short of its legitimate meaning now. It is the law of language to be always changing, and therefore change is not illegitimate.

But suppose the change was improper: that is not the question; nor whether it was introduced by Puritans or Mohammedans. Not legislation, but interpretation, is our business; not the correction of language, but the ascertainment and application of its meaning. What did the legislature mean by the word "adultery"? Or, as they have not defined it, what did

it mean in common usage? We do not understand it to be questioned that it meant sexual intercourse by a married person with any person not his or her wife or husband. We cannot doubt that this was its meaning, in common usage, when this law was passed. So the legislature must have used it, and so they have been always understood.

In describing the offense in an indictment, no greater particularity has heretofore been required than is found here, and this ought to be enough to sustain this indictment. We do not think that more ought to be allowed, unless it might be in stating the place. "Commit adultery" does not merely imply, but expresses, carnal knowledge, for that is its very meaning. Having carnal knowledge is but a euphemism of it.

It is not charged that Matilda Moyer was not his wife; but his wife is named by a different name as still alive, and no one can reasonably suppose that the wife and Matilda Moyer are not different persons.

Judgment affirmed, and record remitted.

ADULTERY, WHAT CONSTITUTES: See *State v. Wenthrop*, 69 Am. Dec. 88, note 62, where other cases are collected.

SINGERLY v. SWAIN'S ADMINISTRATORS.

[88 PENNSYLVANIA STATE, 102.]

DEBT DUE FROM DECEDENT CANNOT BE SET OFF by the defendant in an action brought by an administrator to recover the difference between the sum at which he bid off, at orphans' court sale, part of the real estate of the decedent, and the sum at which it sold on a resale, made necessary by his refusal to comply with his bid.

REGULARITY OF PROCEEDINGS IN ORPHANS' COURT CANNOT BE INQUIRED into in a collateral proceeding.

TERMS OF ORPHANS' COURT SALE ARE PART OF JUDICIAL DUTY, to be made by the court, and not by the executors or administrators, and may be amended or modified by the court at any time before the record is made up and closed.

ALTERATION BY COURT OF TERMS OF SALE OF DECEDENT'S REAL ESTATE will not relieve from liability a purchaser making default in payment of his bid.

LIEN CREDITOR PURCHASING AT ORPHANS' COURT SALE MUST COMPLY WITH REQUIREMENTS of the act relating to executions, in order to entitle him to retain a portion of the purchase-money.

ASSUMPSIT by the administrators of T. W. Swain, deceased. The facts appear from the opinion.

Juvenal, for the plaintiff in error.

S. H. Perkins, for the defendants in error.

By Court, WOODWARD, J. Nothing is more clear than that the defendant's set-off was properly rejected. For what was it? The defendant, called on to answer for the difference between the sum at which he bid off, at orphans' court sale, part of the real estate of the decedent, and the sum at which it sold on a resale, made necessary by his refusal to comply with his bid, offered, in defense of himself, to show the decedent's indebtedness to him.

It would seem that the rule of the district court in relation to notice of set-offs had not been complied with by the defendant; but his offer was not evidence on general principles.

The estate of Swain, said to be largely insolvent, was in process of administration, for distribution among creditors according to law. The orphans' court sale was a necessary step in this process. The defendant, by bidding off the property in question, entered into a contract with the executors, as such, on which he is now called to answer. If he may set off the indebtedness of the decedent, and thus release himself from the consequences of his contract, he not only obtains an advantage over other creditors of the estate, but he makes it impossible for the executors to distribute the estate according to law.

Besides, the debts are not in the same right. One of them never existed between the defendant and the decedent, and the other existed between them only. The principle has been twice ruled: *Wolferberger v. Bucher*, 10 Serg. & R. 10; *Steel v. Steel*, 12 Pa. St. 64; and was applied to parties in a fiduciary relation of a different character, in *Beeler v. Turnpike Co.*, 14 Id. 162.

The regularity of the proceedings in the orphans' court is not to be inquired into in this collateral action. Having acquiesced in them without appeal, the only question which the defendant has raised upon this record, to be noticed by us, is the legal effect of the alterations of the terms of sale.

We have lately had occasion to consider the nature of orphans' court sales of real estate, with especial reference to the power and duty of the court to prescribe terms of sale. We hold that the terms of sale are part of the judicial decree, and are to be made by the court, and not by the executors or administrators; and, like any other decree, may be amended or

modified by the court, at any time before the record is made up and closed.

When Mr. Singerly twice purchased this property and refused to comply, he was bound to take notice that the orphans' court had power to alter the terms of the next sale. He ran the risk of a change of terms that would depress the price. He has no reason, therefore, to complain, now that such change was made. His capricious conduct could not impair the powers of the court. Because they had again and again ordered a sale, with only fifty dollars paid down, and had ascertained that on such terms the purchaser could not be held, were they to be denied the right to make a sale on terms that would hold the purchaser? To deny the legal effects of such a sale is to deny the right to make it. The act of assembly requires the sale to be made under the "direction" of the court, and in a collateral proceeding they are always to be considered to have exercised a sound discretion. We hold, therefore, that they had a right to alter the terms of sale, and that such alteration discharged no liability which the defendant had incurred by reason of his non-compliance with the former sale.

But he complains that he was a lien creditor to nearly the amount of his bid, and that he offered to pay the difference to the executors. If he was a lien creditor, he was within the first and second sections of the act of the twentieth of April, 1846, relating to executions, *Purd. Dig.* 343, and should have pursued the directions therein contained. He should have tendered to the executors a certified copy of his lien and his receipt for the amount thereof, and then, on payment of the difference between that and his bid, he would have been in a condition to assert his rights and prevent a resale.

But this part of his duty he appears to have neglected, and has thrown himself on the forlorn hope of disputing the orphans' court's right to vary the terms of sale.

The cases cited to sustain him do not apply, and the judgment must be affirmed.

Judgment affirmed.

SET-OFF: See *Hayes v. Hayes*, 73 Am. Dec. 709, note 711, where other cases are collected.

ORDERS OF PROBATE COURT, WHEN NOT COLLATERALLY ATTACKABLE: See *Saltonstall v. Riley*, 65 Am. Dec. 334, note 341, where other cases are collected.

COX v. FREEDLEY.

[23 PENNSYLVANIA STATE, 124.]

DEED OF LAND BOUNDED BY SIDE OF STREET CONVEYS TITLE TO CENTER of the street, although the distances given in the deed bring the line only to the side of the street; and if such street be vacated, the grantee has the right to extend his line to the middle of it.

STAKE BY SIDE OF STREET IS NOT SUCH FIXED MONUMENT as will control the rule that a grantee of land bounded by the side of a street takes to the center thereof.

CONSTRUCTION OF DEED FREE FROM AMBIGUITY IS FOR COURT, and not for the jury, but the court, in construing a deed, should look at the circumstances under which it was made, for the purpose of arriving at the intention of the parties.

EJECTMENT by Jacob Freedley against Abraham R. Cox for a lot of land in Norristown. On the fifth of November, 1849, John Freedley, being the owner of a large property in said borough of Norristown, conveyed to Abraham R. Cox, the defendant, a portion of it, by the deed referred to in the opinion. In 1851, John Freedley conveyed the remainder of the premises to Jacob Freedley, the plaintiff, the deed describing the property as bounded by the south-east side of Race street. Race street was opened in 1834, and in 1855 was duly vacated, and a new street was laid out and opened partly on the bed of Race street, leaving a strip of land between the side of the new street and the defendant's ground, but not extending to the center of the old street. The defendant took possession of this strip, and for it this ejectment was brought. There was a verdict and judgment for the plaintiff. Other facts appear from the opinion.

Boyd, for the plaintiff in error.

Krauss and McMiller, for the defendant in error.

By Court, **WOODWARD, J.** The case of *Paul v. Carver* was twice before this court, and is twice reported: 24 Pa. St. 207 [64 Am. Dec. 649], and 26 Id. 223 [67 Am. Dec. 418].

On the last hearing it came down to the question, whether the owner of a city lot, whose deed is bounded "along the northerly side" of a particular street, has title to the center of the street, so that after vacation of the street by public authority he may recover in ejectment the ground lying between the northerly side and the center. In deciding this question in favor of the plaintiff, we admitted that the intention of the parties was to control the construction of the deed, and that

they might define their intention to be bounded by the side of the street so explicitly as to limit the right; but we held that such intention was not to be inferred from the words "along the northerly side," nor from measurements of the rectangular lines that would terminate at the side.

That the decision was well supported by reason and authority was fully shown by the learned judge who delivered the opinion. I relieve the present case of much discussion, by reference to what was said when that case was before us, especially the last time.

We have here for construction the words contained in the deed of John Freedley to Abraham R. Cox, of the fifth of November, 1849.

It describes a lot in the borough of Norristown, by courses and distances, and by streets and lanes. "Along the north-east side of Egypt street," and "along the south-east side of Race street," are two parts of the description. The measurements to these streets would terminate at their sides respectively.

Now, applying the ruling in *Paul v. Career, supra*, to this description, is it not perfectly manifest that we must say Cox took to the middle of Egypt and Race streets?

And why should not the doctrine of that case be applied?

It was maturely considered and unanimously pronounced. It was shown to be agreeable to the general principles of the common law, as laid down by Chancellor Kent and other text-writers, and as they had been applied in numerous cases, in England and our own country. It was shown, also, to be sanctioned by the general sense and understanding of the people—and that any doubt or denial of it would introduce intolerable inconvenience, confusion, and litigation.

It was well known that there were cases in the books inconsistent with this doctrine. Our own case of the *Union Burial Ground v. Robinson*, 5 Whart. 18, was relied on then, as it is now; but that case, if confined to its circumstances, is not authority here. The street in question there never had any existence except on paper. Though laid out, it was never opened through the land that was in controversy, and, it would seem, could not have been, without a previous order made and granted by the supreme executive council directing it to be done, which did not appear to have been applied for or obtained.

The court held that the grantee should be limited by the

very precise measurements expressed in his deed, which brought him to, and not into, this imaginary street, and they left the right of soil in the whole street in the grantor—a doctrine, this last, which is not to be applied to streets actually opened and used by the public, as is shown by the case of the *Penny Pot Landing*, 16 Pa. St. 89. That was the case of an addition made to the width of Vine street in the city of Philadelphia, by the agents of William Penn, in 1690, and this court held that the rights of the adjacent and neighboring lot-holders, as well as the public, to Vine street so enlarged, were vested rights, of which they could not be divested by William Penn or his successors. And this is the general principle in all towns. The dedication of streets, lanes, and alleys divests the proprietor of his right of soil therein, and purchasers of lots bounded on streets acquire title *usque ad flum mediz*, unless there be a very express limitation of their grants to the margin of the street.

The law with respect to public highways and unnavigable streams is the same, in respect to the presumptions that arise from grants founded thereon; and the general principle is, that there must be a reservation or restriction expressed or necessarily implied, which controls the operation of the general presumption and makes the particular grant an exception, or else the grant carries the grantee to the middle of the stream or highway: *Per* Nelson, J., in *Howard v. Ingersoll*, 13 How. 421. In the elaborately considered case of *Child v. Starr*, 4 Hill, 369, overruling *Starr v. Child*, 20 Wend. 149, it was held by the court for correction of errors in New York, that lines running to a monument standing on the bank, and thence running by the river or along the river, do not restrict the grant to the bank of the stream: See also the note to *Ex parte Jennings*, 6 Cow. 536 [16 Am. Dec. 447].

On the other hand, there are not wanting authorities to the effect that when the descriptive words are “by the side of,” “by the margin of,” or “by the line of” the stream, the underlying soil is excluded: *Sibley v. Holden*, 10 Pick. 249 [20 Am. Dec. 521]; *Starr v. Child*, 5 Denio, 599; *Storer v. Freeman*, 6 Mass. 435 [4 Am. Dec. 155].

But it was with a knowledge of such authorities, Judge Lewis remarked, in *Paul v. Carver*, *supra*, that the circumstance of being bounded by the side of a street, instead of the street itself, was entirely too insignificant to produce a result so inconvenient, and so contrary to the practice of the people.

And when it is considered that the laying out and dedication of streets in a town divests the proprietorship of the original owner—that every purchaser of a town-lot buys with reference to the existing highways, would not pay the price he does if it were not for those highways, and yet that power exists in the government to vacate every such highway—this doctrine becomes a most reasonable and necessary one. Without it, any lot-owner who has built on the line of his lot may be shut into his house without the possibility of stepping out except he trespass on his neighbor.

It is not probable that any lot in the borough of Norristown would have been paid for and built on in the manner it has been, if it were not for the understanding that the owner was forever to go out and come in on the ground in front of him. He may or may not have adverted to the precise phraseology of his deed—he may or may not have remembered the public right to vacate the street in front of him, but he has looked from the first to the ground of that street for his means of ingress and egress; and we should carry consternation into that flourishing town, and into all our boroughs and cities, if we should tell the people that their rights in the streets which bound them terminate with the public franchise of passage.

Deeds may expressly exclude the streets, but unless they do, the implication is, from such terms as are found in this deed, that half the street is included. Unless we say this, we must reverse *Paul v. Carver, supra*, and we see no ground for reversing or questioning a case so carefully decided. It can scarcely be said to be in conflict with the case of the Union Burial Ground, and though it is inconsistent with some extra state adjudications, it seems to us more worthy to be followed than they are.

Terms of description such as these may be regarded, therefore, as having a technical meaning, and as importing a grant to the middle of the street, unless controlled by something else in the deed.

The only thing the learned judge found to control them was the word "stakes." At the north-east corner of Egypt and Race streets, and at the south corner of Penn and Race streets, stakes are mentioned. These the learned judge considered fixed monuments. If they were such, they could not be in the street any more than, in some of the water cases referred to, the marked trees or stakes could have stood in the middle of the stream.

Where surveys are bounded on streams or streets, the marks which denote them, if higher than the surface of the water or ground, must necessarily stand on the margin. Sometimes a stone or ring are planted beneath the surface, and then they are expected to be at the very corner or line. .

But what sort of a monument is a stake? It is so unsubstantial that in country surveys it usually indicates a corner which the surveyor never visited, and which exists only on paper. Artificial boundaries which are meant to be fixed monuments are made with more care than merely sticking a stake, which the next wind may blow over, which one of a thousand accidents may destroy, and which must rapidly decay, if not otherwise obliterated. So frail a witness is scarcely worthy to be called a monument or to control the construction of a deed in so important a particular as that under consideration.

Nor can we regard the intention of the parties, as found by the jury, the true criterion of construction. There was no ambiguity on the face of the deed. The question raised was, What were the legal import and significance of the words employed by the parties? That was a question for the court, and not for the jury. The jury were no more to measure the legal effect of these terms than they would be permitted to judge of words of inheritance or perpetuity in a deed.

The intention of the parties, as deduced from the language of the instrument, was the criterion of construction, and in making that deduction, the court would look at the circumstances in which the conveyance was made—at the fact that Mr. Freedley might naturally desire to retain the proprietorship of Race street for the protection of the head-race of his mill; and on the other hand, that Cox was buying town property with reference to surrounding streets. In reference to Freedley's interest in the head-race of his mill, the principle decided in *Seibert v. Levan*, 8 Pa. St. 383 [49 Am. Dec. 525], should not be lost sight of in settling the construction of the deed; for if he retained the right to enter for repairs notwithstanding his conveyance, there would be less reason for restricting the descriptive words to the margin of the street.

The judgment is reversed, and a *venire facias de novo* awarded.

GRANTEE OF LAND BOUNDED ON HIGHWAY TAKES TO CENTER THEREOF if the grantor himself had title to that extent, and does not expressly or by clear implication reserve it. And if the highway be vacated, the adjoining owners may extend their lines as far as the middle of the way: *Smith v. Ste-*

comb, 69 Am. Dec. 274, note 275; *Paul v. Carver*, 67 Id. 413, note 417; *Paul v. Carver*, 64 Id. 649, note 651; *Wood v. Appel*, 63 Pa. St. 222; *Robinson v. Myers*, 67 Id. 17; *Lehigh Street—Borough of Easton's Appeal*, 81½ Id. 89, the last three citing the principal case.

CONSTRUCTION OF WRITTEN CONTRACT IS FOR COURT, and not for the jury: *Randall v. Thornton*, 69 Am. Dec. 56, note 59.

WHITE v. SMITH.

[33 PENNSYLVANIA STATE, 186.]

PUNCTUATION MAY AID IN ASCERTAINING TRUE READING OF CONTRACT, but its absence cannot vitiate the contract.

WORDS IN WHICH CONTRACT IS WRITTEN MUST BE TAKEN TO EXPRESS MEANING of the parties thereto, and the meaning of the words may be ascertained without the aid of punctuation.

WORDS OF CONTRACT ARE TO BE TAKEN MOST STRONGLY AGAINST PARTY USING THEM; and he will not be permitted to punctuate them in such a way as to lessen his liability.

RECOVERY OF JUDGMENT AGAINST PRINCIPAL IS NO BAR to an action against him and another on a contract of guaranty executed by them both jointly.

ASSUMPSIT by White against Smith and Robinson on the contract of guaranty written at the foot of the following lease: "Article of agreement entered into between Orange White of the first part and Jonathan Smith of the second part, viz., that White rents to Smith the farm known as the Crandall farm, with twelve good cows in good condition, to come in by the first of May, and an ox-team, for three years from the first day of May next; for which Smith is to pay White three hundred dollars, one hundred dollars to be paid on or before the first day of January of each year; and Smith is also to chop and clear off and fence, and cut up the balance of the rail timber and saw logs on twelve acres of land on the aforesaid farm, where White shall direct, six acres to be cleared off by the middle of September, 1852, and six acres by the middle of September, 1853; White is to run all providential risks of the aforesaid property, and Smith is to be accountable to White for all accidents or damages that happens to the aforesaid property by or through the careless or neglect of the aforesaid Smith; and Smith is to return to White at the end of the three years the aforesaid property in good condition for use. Orange White. Jonathan Smith. Sugar Grove, February 26, 1851." "I hereby bind myself to the aforesaid White for the true and faithful performance of the aforesaid agreement on the part

of the aforesaid Smith in case Smith should die within the three years I agree to pay up to that time and deliver the property to White as above stated. Jonathan Smith. Elijah Robinson. Sugar Grove, February 26, 1851." The action of *White v. Smith*, referred to in the opinion, was an action for eighty-six dollars due the plaintiff for rent under the lease. The court, in that case, gave judgment for the plaintiff for the eighty-six dollars, but it was not paid, Smith being insolvent. This action was then brought on the guaranty to recover the rent, and also damages for breaches of other conditions of the lease. Other facts appear from the opinion.

W. D. Brown, for the plaintiff in error.

S. D. Wetmore, for the defendants in error.

By Court, THOMPSON, J. The first assignment of error in this case is to the negative answer of the court to the plaintiff's third point, and their affirmative answer to the defendants' fourth. These answers regard the construction to be given to the contract on which suit was brought. It was a joint and several instrument.

We have no doubt whatever but that the contract in question was an undertaking or guaranty, by Smith and Robinson, for the faithful performance by the former of his agreement with the plaintiff, with the superaddition of a stipulation for release of liability under certain restrictions, in case of Smith's death during the continuance of the lease. The want of proper punctuation is, if objectionable at all, no more allowable in vitiating the contract, or in destroying its effect, than bad grammar, the rule against which is a maxim of the law. To allow the contractor to punctuate *in mitiori sensu* of his own words would be something of a novelty. I think no case can be found upon which the sense of a contract has depended upon the absence of punctuation marks; words are the most usual evidence of intent, and formed into sentences, are to be taken to express the meaning of the party using them. Punctuation may aid in ascertaining the true reading of a production, but the production may be read and interpreted without such aids. What do the words here mean? And they are to be taken most strongly against the party using them. Read fairly and as they stand, without any effort other than to ascertain all that the contract stipulated for, it is not easy to see anything to justify the construction claimed by the defend-

ants. Indeed, the defendant in error is forced to rest his construction on the unlikely idea that it was meant as a life insurance by the guarantor Robinson. But it would seem to have wanted a premium to make it an insurance. It is idle to dwell on such a view of the case. It is simply an agreement entered into by Smith and Robinson for the faithful performance by Smith of his contract, and in case Smith should die within the three years, then Robinson to pay up to that time, and deliver the property, as stipulated, to White. That it has been sued upon as joint can make no essential difference—it might well be treated as joint, Smith still living. It would have been incumbered with no inconvenience if he had been dead. That we have given the proper construction to the instrument cannot well be doubted. And this was forcibly illustrated by the counsel for plaintiff in error, when he took the position that if the court below were right, it would lead to the impracticable result, that if Robinson was only to be bound in the event of Smith's death, then Smith, living, might chop, clear, and fence the requisite number of acres of land or not, as he pleased, and the former would not be answerable for any default of his; but Smith dying, then and in that case it was to be held that Smith should chop, clear, and fence the land, and perform the other covenants in the agreement! This would be a pretty hard condition if literal performance was meant to be guaranteed. But what was intended and expected is fully expressed, that Robinson was bound for performance of Smith, and if he died before the lease expired, then Robinson was to fulfill what remained to be performed at that time, and the contract was to be at an end.

We do not think the court were right in holding that the suit of *White v. Smith*, for the rent in question, was a bar to this suit. That was on the covenants in the lease; this one was upon a collateral covenant. That one was upon an instrument which was alone signed by Smith, and of course several; this upon a different instrument, signed by both, and joint and several. It mattered not that the action against Smith did involve to a great extent the same considerations as this action; it was so only because this was a guaranty, while the other was on the contract guaranteed, and in this respect it was essentially an action resting on a different consideration from that on the lease. It was a suit to enforce the obligation of suretyship. This widens the relation between

the two actions. Standing on this footing, the action against Smith by White was not outside of the duty of the guarantee, or prejudicial to Robinson, the guarantor. It was simply an effort to enforce performance against the principal, in the first place, instead of looking to the surety. Smith being bound with Robinson in a suit on a different contract, although as surety for the same contract, does not contravene the rule that no one shall be twice vexed for the same cause. I see no impropriety or difficulty in a party being more than once sued for the enforcement of the same duty or obligation, if he have given more than one contract, in different forms, for its performance. One judgment with satisfaction would bar any subsequent recovery certainly; but satisfaction is a different thing from the recovery of a judgment never paid, or likely to be paid, when, as in this case, the party, it appears, is insolvent. For the reasons thus given, this judgment must be reversed.

Judgment reversed, and a *venire de novo* awarded.

UNSATISFIED JUDGMENT AGAINST ONE OF TWO JOINT DEBTORS, EFFORT OF. See *Ferrall v. Bradford*, 50 Am. Dec. 233, note 301, where other cases are collected.

WORDS OF CONTRACT ARE TO BE CONSTRUED MOST STRONGLY AGAINST PARTY USING THEM: *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 286, citing the principal case.

BACKENSTOSS v. STAHLER'S ADMINISTRATORS.

[33 PENNSYLVANIA STATE, 251.]

GROWING CROPS ARE PERSONAL PROPERTY, but pass by conveyance with and as appurtenant to the realty, unless severed therefrom by reservation or exception.

VENDOR MAY SHOW BY PAROL EVIDENCE THAT GROWING CROPS WERE RESERVED on a sale of the land, notwithstanding the deed contains no such reservation.

PAROL RESERVATION OF GROWING CROPS IS SEVERANCE THEREOF, and prevents them from passing as realty under an orphans' court sale of the land.

RESERVATION OF GROWING CROPS NEED NOT BE BY DEED or in writing; but it is otherwise as to the natural products of the earth, which grow spontaneously, such as trees, etc., a reservation of which must be in writing.

DEED EXECUTED BY HEIRS AND WIDOW OF DECEDENT, INSTEAD OF BY ADMINISTRATOR, for the purpose of carrying into effect an orphans' court sale of the land, is a substantial though not technical compliance with the order of court, and does not render the conditions of sale less operative than if the deed had been made by the administrator.

OBJECTION THAT PUTTEE WAS EMPLOYED AT ORPHANS' COURT SALE OF REALTY COMES TOO LATE after confirmation, receipt of the deed, and possession taken under it.

RESERVATION OF GROWING CROPS GIVES RIGHT TO ENTER and cut and carry them away, and if they are wrongfully taken by the vendee, trover will lie for them.

VALUE OF GOODS TAKEN, WITH INTEREST, IS ORDINARY RULE OF DAMAGES in trover, but a jury may go beyond this.

DEFENDANT IN TROVER WHO REPUDIATES POSSESSION OF GOODS UNDER CONTRACT, and claims by a wrongful conversion, cannot claim the benefit of the contract in mitigation of the damages.

OBJECTION ON GROUND OF NON-JOINDER OF PARTIES must be taken by plea in abatement.

TROVER. The facts are stated in the opinion.

Longnecker, Reeder, and Green, for the plaintiff in error.

Styles, Bridges, and A. E. Brown, for the defendants in error.

By Court, THOMPSON, J. It is settled in this commonwealth that growing crops are personal property, subject, however, to pass with and as appurtenant to the realty, in case of conveyance, unless severed by reservation or exception therefrom: *Bear v. Ritzer*, 16 Pa. St. 178 [55 Am. Dec. 490]; *Wilkins v. Vashbinder*, 7 Watts, 379. Such was the rule of the common law, and uniformly held in England not to have been altered by the statute against frauds and perjuries. Amongst the numerous cases on this point, see *Sainsbury v. Matthews*, 4 Mee. & W. 343; *Evans v. Roberts*, 5 Barn. & Cress. 829; *Dunne v. Ferguson*, Hayes, 540.

The plaintiff in error was the purchaser of a tract of land from the defendants in error, administrators of the estate of Daniel Stahler, deceased, under an order of the orphans' court of Lehigh county, in proceedings in partition. At the sale, there was a reservation or exception of the grain by writing. The deed, afterwards made, contained no reservation, and the vendee claims to hold it in the absence of such reservation in the deed, and by force of it, notwithstanding the exception or reservation in fact to the contrary. On the trial below, which was an action of trover to recover the value of the grain, the plaintiffs gave the written conditions in evidence, as well as offered parol evidence, to show that the grain was excepted from the sale of the land.

To the ruling of the court in regard to this matter, the first, fourth, fifth, and ninth exceptions apply, and will be considered together. It was offered to be proved by the plaintiffs that at the commencement of or during the sale, and before the

property was struck down, the crier proclaimed that the grain in the ground was reserved, excepting every fourth bushel, in case the purchaser should choose to harvest it for that. This evidence was admitted under exception, and was, with the written conditions, referred to the jury, who found in favor of the plaintiffs. It was resisted, on the ground that it contradicted, not only the order of court, but the conditions of sale. It will be remembered that the order of court originated in proceedings in partition, and necessarily related exclusively to the realty. The grain, we have shown, was essentially personalty, subject to pass as incidental to the realty by a conveyance of the latter. If excepted or reserved, this operated as a severance, and it became thereafter, to all intents and purposes, personalty, to which the order had no application. When the land was about to be sold, the grain crop rested on the contingency of whether it should be excepted from the sale by the administrators or not. If not reserved, it would pass by the conveyance as appurtenant to the realty, but if reserved or excepted, the vitality and scope of the order was in no way limited or impaired. It still operated to authorize the sale of what it described, viz., the realty, and no more. The reservation did not change the denomination of the property in the crops; it only prevented their passage by the conveyance. In this view of the matter, it is apparent that the order was not affected or contradicted by the conditions of sale, or the oral announcement in regard to them.

Nor do we perceive the force of the objection that the oral testimony contradicted the written conditions. At most, the announcement of the crier, which the jury have found was heard by the defendant, only declared what the written conditions defectively expressed. They either meant this, or there was such an ambiguity as might be explained by parol. In either event, the defendant would be bound. But we think the fair interpretation of the fourth clause of the condition of sale discloses the same reservation as did the oral conditions announced by the crier, that the grain was excepted. It is as follows: "All straw from the winter grain now in the ground shall remain on the premises, except two ton." Here is a stipulated retrocession of the straw to the purchaser. It cannot well be doubted but that this would be an insensible act if it had not been already reserved. That it could be reserved or excepted by a reservation or exception of the crop, will hardly be doubted either; hence, having been reserved by an excep-

tion of the grain, it became necessary, if it was an object to the purchaser to retain the straw on the farm, that it should be reserved to him out of the exception of it, and hence the stipulation that it should remain, excepting two ton. That this was so understood by the parties, is very apparent. The fourth clause of the conditions must be held to mean this, or it means nothing, which we are not at liberty to hold, if there be substance enough to disclose an intent, which we think there is. In this view of it, we think the court should have so interpreted the conditions of sale, and this would have rendered explanatory evidence unnecessary. Under these circumstances, it is obvious the parol evidence did the defendant no harm, as the case was against him on this point without its aid.

But in regard to an interest in a matter of a nature so temporary as growing crops, it is not necessary that the reservation should be by deed or in writing. It is not an interest in lands. "Growing crops of grain and vegetables, *fructus industriales*, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may be also sold on execution as personal chattels:" *Green v. Armstrong*, 1 Denio, 550, and cases there cited, showing this to be the rule of the common law, and not changed by the statute of frauds. A different rule exists, undoubtedly, in regard to the natural products of the earth which grow spontaneously and without the culture of man's hands, such as trees, etc., a continuous right to enter and cut which would require to be reserved by an instrument in writing: 2 Parsons on Cont. 313, note k, 314. That the reservation of grain might be made by parol is inferable from the language of Sergeant, J., in *Wilkins v. Vashbinder*, 7 Watts, 879, who, after declaring that the grain in that case passed by the deed for the land, added, "there being no reservation contained in it, or made at the time of its execution." The nature of a reservation in such a case as this is a collateral contract, and executory. It regards a subject that the statute does not require to be in writing, and therefore need not be. We know that a lease for a period short of three years is not void for want of a written instrument, and it would be strange if by a mere change in the form of the transaction a crop for one year could not have the same protection. The exception or reservation in this instance did not contradict or alter the deed in the least. And if the written conditions had been ambiguous, testimony might well have been received to ex-

plain the ambiguity. We have said that this was unnecessary, however, but if it had been otherwise, the declarations of the defendant on the very point in controversy, going to show his admission of the terms on which he made the purchase, were surely evidence against him.

The fifteenth assignment of error regards the effect of the deed of the seventh of April, 1855, and should properly be next considered. The court were requested by the defendant to charge that it was, "on its face, conclusive against the reservation claimed by the plaintiffs, and there being no evidence of any omission by fraud or mistake, the plaintiffs cannot recover." This was negatived by the court.

Treating the deed simply as a consummation of the sale by the administrators under the order of court, we have determined this point against the plaintiff in error for the reasons already given. The deed, however, was made, not by the administrators, but by the heirs and widow of the decedent. The defendant below claims that this was independent of the proceedings under the order of the orphans' court, and that the exception in the conditions of sale did not apply to it, or affect the presumption that the grain passed. It fully appears, however, that the deed was so made at the request of the defendant, as being more satisfactory to him—that there was no change in the consideration to be paid for the land from that bid for it at the sale; that the terms of payment were the same; and that the proceedings, order, report, and confirmation of sale still remain unreversed and in force. The only departure from the line of proceedings commenced was the form in which the deed was made. This was done as a matter of convenience, and at the request of the defendant. The jurisdiction of the court was not ousted by this change, and that this was so understood, is confirmed by the fact that the proceedings in the orphans' court were never set aside. The deed thus made, being but an alteration or change of the formal mode of conveyance, without any new consideration or change of terms, cannot otherwise be considered than as a substantial, although not a technical, compliance with the order of court, and does not annul the conditions of sale, or render them less operative than if the deed had been made pursuant to the order of court. To give this part of the case the construction contended for by the plaintiff in error would be to give him an unfair advantage, in an act done at his request and for his benefit. The law regards the transaction, in the manner in

which it was consummated under the evidence, as a substantial compliance with the order of court. The conditions of sale ought to have the same effect as if the deed had been made by the administrators alone, and we think the court committed no error in their answer to the point on which this error was assigned.

The seventh assignment rests upon the rejection of evidence, offered to prove that one of the administrators employed a puffer to bid at the sale. The object of the offer was not to nullify the sale in all its extent, but only to get clear of it as an administrator's sale, and with it the effect of the conditions of that sale. It is not doubted but this might have been a good ground to have set aside the sale, if the purchaser, when he bid off the property, had been ignorant of it, and had made the objection before the confirmation; but after that, and the receipt of the deed, with the possession and occupancy of the property under it, it is too late. We need not elaborate this point.

The reservation of the grain by reason of the exception of it from the sale being established, no doubt can exist that trover will lie to redress a wrongful conversion. The right to the grain gave the administrators a right to the possession, and a right to cut and carry it away; hence, if wrongfully taken away by the owner of the fee, or any one else, trover would lie to recover it: 1 Ch. Pl. 152; *Stultz v. Dickey*, 5 Binn. 285; *Myers v. White*, 1 Rawle, 353; *Forsythe v. Price*, 8 Watts, 283 [34 Am. Dec. 465].

The value of the grain, with interest as a mode of estimating the damage, was not error by the court: *McDonald v. Scaife*, 11 Pa. St. 386 [51 Am. Dec. 556]. This is a measure of damage often indicated, but a jury may doubtless go beyond it; but it does not appear that they did so in this case.

Nor do we think there was the least ground for complaint that the learned judge charged, in substance, that as the defendant had repudiated the possession of the crop under the contract, and claimed it all by a wrongful conversion, he was not entitled to the benefits of the contract in shielding him from the full amount of the property in damages. He could not claim in inconsistent rights.

If there had been any serious objection on the ground of non-joinder of parties as plaintiffs, about which the facts leave the matter somewhat in doubt, the defendant should have taken advantage of it by plea in abatement: Arch. Civ. Pl. 51;

1 Ch. Pl. 68; *Railroad v. Boyer*, 13 Pa. St. 497. Upon the whole, we discover no error in the numerous assignments in this case, and the judgment must be affirmed.

Judgment affirmed.

STRONG, J., dissented.

GROWING CROPS PASS BY DEED OF LAND: See *McIsaacs v. Harris*, 64 Am. Dec. 196, note 197, where other cases are collected.

GROWING TREES AND OTHER PRODUCTS OF LAND NOT PRODUCED ANNUALLY by labor and cultivation are regarded as part of the land: *Harrell v. Miller*, 72 Am. Dec. 154, note 157, where other cases are collected.

EMPLOYMENT OF PUFFERS, EFFECT OF: See *McDowell v. Simms*, 57 Am. Dec. 595; *Towle v. Leavitt*, 55 Id. 195, note 204; *Staines v. Shone*, Id. 492, note 494, where other cases are collected.

NON-JOINDER OF PARTIES SHOULD BE TAKEN ADVANTAGE OF BY PLEA IN ABATEMENT: See *Deal v. Bogue*, 57 Am. Dec. 702, note 707.

MEASURE OF DAMAGES IN TROVER: See *Connor v. Hillier*, 73 Am. Dec. 105, note 106, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Johnson v. Tautlinger*, 31 Iowa, 502, to the point that a parcel reservation of growing crops at the time of the sale and conveyance of the land can be shown in a controversy respecting them between the grantor and the grantee. In that case are cited numerous other cases on both sides of this question, although this precise question was not therein decided. It is also cited in *Forsyth v. Wells*, 41 Pa. St. 294, to the point that trover lies for coal mined beyond the line of a mine by mistake, and carried away by the party taking it out; and in *Cook v. Steel*, 42 Tex. 59, to the point that growing crops may be mortgaged.

BAKER v. LEWIS.

[38 PENNSYLVANIA STATE, 301.]

EVIDENCE FROM WHICH ARISES FAIR AND LEGITIMATE INFERENCE OF FACTS SUFFICIENT TO JUSTIFY VERDICT for the plaintiff must be submitted to the jury; but if there be no such evidence, a judgment of nonsuit may be properly entered.

WHERE JUDGMENT OF NONSUIT IS PRESENTED FOR REVIEW, it is essential that all the testimony adduced by the plaintiff on the trial should fully appear of record, and be certified and sent up with it to the supreme court.

OHIO, THOUGH NOT NAVIGABLE RIVER IN STRICT COMMON-LAW SENSE, IS PUBLIC HIGHWAY for direct navigation of boats, and is, therefore, such for all convenient purposes necessarily appertaining thereto.

RIGHT TO MOOR BOATS AND OTHER CRAFT AT WELL-KNOWN LANDINGS AND WHARVES on a stream is as well secured and protected by law as that of actual navigation.

PERSON MOORING HIS CRAFT AT ACCUSTOMED LANDING IS BOUND TO LEAVE SUFFICIENT ROOM for the passage of other craft; but this is all that the law requires of him.

VESSEL IN MOTION MUST, IF POSSIBLE, AVOID ONE MOORED or at anchor; and in case of injury to the latter by the former, no excuse will avail but unavoidable accident, or that *vis major* which no human skill or precaution can guard against or prevent.

LAW REQUIRES THOSE IN CHARGE OF MOVING VESSEL TO EXERCISE CONSTANT CARE and vigilance to avoid collision with others.

IN CASE OF COLLISION, IF BOTH PARTIES ARE AT FAULT, NEITHER CAN RECOVER damages at law.

FAILURE OF MOVING VESSEL TO KEEP PROPER LOOKOUT is, in case of collision, by the maritime law, regarded as negligence on her part, especially if the omission may have contributed to the disaster.

ACTION on the case for negligently and unreasonably obstructing the navigable channel of the Ohio river, whereby the plaintiffs' boat was injured and sunk. The facts are stated in the opinion.

Hamilton and Hopkins, for the plaintiffs in error.

Selden and Burgwin, for the defendant in error.

By Court, CHURCH, J. When there is any evidence from which arises a fair and legitimate inference of facts legally sufficient to justify a verdict for plaintiff, it is conceded the court should submit it to the jury; but otherwise a judgment of nonsuit may be properly entered. It is therefore manifestly essential, when such a case is presented for review, that all the testimony adduced by plaintiff on the trial should fully appear of record, and be certified and sent up with it to this court. But we have nothing of the kind, nor anything resembling it, nor any record proceedings whatever exhibited in the paper-book—not even so much as an indication of the sort of action instituted, nor whether there was in reality any issue pending, or any trial, verdict, or judgment in the court below. The defendant has taken advantage of this omission by the plaintiffs, and has notified them of his intention to do so in his paper-book served upon them, and yet there is no correction made, nor explanation given or attempted. We cannot, therefore, allow the objection to pass without observing that there is enough in it alone, under the rules of practice here, to justify a *non pros.* of this writ of error: Rules 16 and 17, 18 Pa. St. 579. Instead, however, of making such summary disposition of the case, we proceed to consider and to determine the question here assumed to have arisen and been adjudicated in the court below.

The Ohio is not a navigable river, in a strict English common-law sense, but having been by the act of assembly of the

twenty-first of March, 1798, declared a public stream or highway "for the passage of boats and rafts," the like incidents and consequences attach to it, so far, at least, as the ordinary purposes of navigation are concerned, and should be thus treated in the discussion and decision of the question involved in this cause. The river, being therefore a public highway for the direct navigation of boats, is consequently such for all convenient purposes necessarily appertaining thereto. And of these, there are perhaps none more particularly essential than the mooring of boats and other craft at the well-known landings and wharves on the stream. This right is as well secured and protected by law as that of actual navigation. Indeed, it may be considered as a part and parcel of it, and is only subject to restriction on the principles that govern in the use of all public ways or streets. The enjoyment of one right must not exclude the other. He who moors his craft at an accustomed landing must be careful to leave sufficient room for the passer-by; the laws of navigation require no more of him. On the other hand, the vessel in motion must, if possible, steer clear of and avoid the one moored or at anchor: 1 Conkling's Adm. Juris. 306. And in case of injury to the latter by the former, no excuse will avail but unavoidable accident, or that *vis major* which no human skill or caution can guard against or prevent: *Girolamo*, 3 Hagg. Adm. 169, 173. The law demands of those in charge of moving vessels constant care and vigilance to avoid collision with others: 1 Conkling's Adm. Jur. 298. And if both parties are in fault, neither can recover damages at law.

These are well-settled principles, sustained by authority and good sense, and upon a careful review of the alleged facts will be found peculiarly applicable to the present case, and fully supporting the views entertained by the learned judge before whom this cause was tried: See cases on the subject, 2 Whart. Dig. 686, 687, tit. Shipping, div. Collision.

The material substance of the facts in evidence shows that the defendant's boats were moored at a well-known landing on the left bank of the river, where the natural channel is on the right, and not extending into the stream more than about one hundred and twenty feet; and at a place where the navigable width of it, at the then stage of water, was nearly two thousand feet, and the same for a distance of at least half a mile above and below, so that the moored boats could have been avoided, the witnesses say, if taken in time. And there is no proof that

those in charge could not have seen the landing and the craft there in time, if a proper lookout had been kept up. It is true, there is evidence that exertions were used to avoid the collision as soon as the pilot saw defendant's boats, but none that he kept such lookout as the law requires under circumstances like these, and saw them at the earliest practicable period. By the rules of maritime law, it is deemed negligence in the moving vessel, in case of collision, where it is not shown that a proper lookout was kept up, especially if it be indicated that the omission to do so may have contributed to the disaster. It does not appear to have been at all necessary for the navigation of plaintiff's boats to run so close to the left shore at this point; but it was done, so says the witness, to avoid work. It is very manifest, therefore, from all these various circumstances proved by the plaintiffs, that in mooring his boats the defendant was only in the exercise of a lawful right, and did not unlawfully obstruct the navigation of the river; and that the injury sustained by the plaintiffs is not chargeable to him, but resulted from what the law adjudges to be negligence, or want of ordinary care and foresight, on the part of those who had the direction in the navigation of their boats. According to the facts proved, and the principles of law already stated, there might have been, perhaps, propriety in the defendant claiming reparation from the plaintiffs if his boats had received injury. Without, however, speculating as to this, we are of opinion the facts proved did not justify a verdict in favor of plaintiffs, and that the court below committed no error in directing a judgment of nonsuit to be entered in this case.

Judgment affirmed.

WOODWARD, J., dissented.

RIGHTS AND DUTIES, NOT FOUNDED ON CONTRACT, OF VESSELS IN NAVIGABLE WATERS.—The great increase in the number of vessels engaged in the commerce of the world during the present century, and especially since the introduction of steam power in navigation, has rendered a knowledge of the rights and duties of vessels a matter of great importance. The great maritime nations of the globe have found that the old rules of navigation which answered the purpose in the days of sailing ships are no longer sufficient to insure the safety of life and property at sea, and, accordingly, nearly all the countries that have any foreign commerce have, since the year 1862, adopted a uniform system of rules and regulations intended to prevent collisions at sea: Holt's Rule of the Road, 2; Jenkins's Rule of the Road at Sea, 43; Henry's Adm. Jur. & Proc. 276. These rules prescribe the manner in which vessels shall be navigated, and the lights they shall carry, and, in general, they are to be obeyed and followed, unless special circumstances arise rendering a

departure from them necessary in order to avoid immediate danger. But the paramount law of navigation, the law to which all rules must yield, is that collisions must always be avoided, and every practicable means must be employed to secure that end. The maritime law rigidly exacts from all persons intrusted with the navigation of vessels of every kind unremitting care and vigilance to avoid accidents and injuries by collision, and to extenuate the consequences of accidents when they occur: *Mills v. The Nathaniel Holmes*, 1 Bond, 352; *The Atlantic and The Oydensburgh*, Newb. 139; *The Lincoln*, 1 Low. 48; *The Nacoochee*, 22 Fed. Rep. 855. All vessels are required to exercise skill and diligence to prevent collision, and to avail themselves of every reasonable means to attain that end: *Buzzard v. The Petrel*, 6 McLean, 491; *The D. S. Gregory*, 16 Blatchf. 542; *The Farnley*, 5 Hughes, 298; *The Clityie*, 10 Ben. 588. And a vessel which, seeing the danger of a collision imminent, fails to use every means in her power to avert it, or to abate the consequences of it, is guilty of contributory negligence, although the other vessel was at fault also: *The C. C. Vanderbilt*, 1 Abb. Adm. 361; *The Vin*, 12 Fed. Rep. 906; *The B. & C.*, 18 Id. 543; *The Garden City*, 19 Id. 529. No matter what the prior fault of the other vessel may be, a vessel is bound, under all circumstances, to use all reasonable vigilance and skill to avoid collision with her: *The Maria Martin*, 12 Wall. 31; *Boggs v. Parr*, 3 Hughes, 504; *The Buckeye*, 11 Biss. 92; *The Warren*, 18 Fed. Rep. 559. A vessel out of her proper place is not to be run into with impunity if she can be avoided by the exercise of ordinary skill and care: *Cummins v. Spruance*, 4 Harr. (Del.) 315. Nor has a vessel any right to cast herself upon another merely because the latter may be out of her proper course and in that of the former. Both vessels are bound to use ordinary care to avoid collision with each other: *Moore v. Moss*, 14 Ill. 106. And if a vessel can, by taking extraordinary precautions, avoid a collision, it is her duty to do so. Thus a schooner becalmed, or nearly so, while going around a dangerous bend, is bound to make use of oars, or of a small boat ahead, to keep some steerage-way in order to avoid collision: *The Alicia A. Washburn*, 19 Fed. Rep. 788. A sailing vessel is bound to change her course in meeting a steamer, if she is in immediate danger, and can thereby avoid collision: *The Nacoochee*, 22 Id. 855. A technical adherence to the sailing rules prescribed by the act of congress will not absolve one vessel from the duty of avoiding collision with another if she can do so by the exercise of ordinary care. And a vessel which obtains knowledge of the position of an approaching vessel through other lights than those prescribed by the act of congress is as much bound to act on the knowledge so acquired as if it had been imparted through signals so prescribed: *Hoffman v. Union Ferry Co.*, 68 N. Y. 385. Vessels approaching each other are not required to change their course until they are near enough to each other to involve some risk of collision: *The Leland*, 19 Fed. Rep. 771. But such obligation does arise in case of continuing approach, or when the lights of the approaching vessel are closing in instead of opening out: *The Manitoba*, 2 Flipp. 241.

IT IS DUTY OF STEAMER TO KEEP OUT OF WAY OF SAILING VESSEL when they are approaching each other in such a way as to involve risk of collision: *Saune v. Tourne*, 29 Am. Dec. 452; *Desty's Ship. & Adm.*, sec. 357; *Haney v. The Louisiana*, Taney, 602; *The Pacific and The Fashion*, Newb. 8; *The Pearl*, Id. 129; *The Leopard*, Daveis, 193; *The Osprey*, 1 Sprague, 245; *The R. B. Forbes*, Id. 328; *The Neptune*, Olc. 483; *Baker v. The City of New York*, 1 Cliff. 75; *The Wenona*, 4 Ben. 207; *The Hansa*, 5 Id. 501; *Leonard v. Whitwill*, 10 Id. 638; *The Kirkland*, 5 Hughes, 109; *The Favorite*, 10 Biss. 536; *The Fashion v. Wards*, 6 McLean, 152; *The C. C. Vanderbilt*, Abb. Adm. 361; *The*

Kentucky, 4 Blatchf. 325; *The Java*, 14 Id. 524; *Waldorf v. The New York*, 1 Flipp. 49; *The Cault*, 20 Fed. Rep. 157; *Haight v. Bird*, 26 Id. 539; *The Belgenland*, 14 Phila. 567; *The Oregon v. Rocca*, 18 How. 570; *New York etc. Co. v. Rumball*, 21 Id. 372; *The Carroll*, 8 Wall. 302; *The Fannie*, 11 Id. 238; *The Benefactor*, 102 U. S. 214; *The Illinois*, 103 Id. 298; *The Shannon*, 2 Hagg. Adm. 173; *The Iron Duke*, Holt's Rule of the Road, 227; *Smyrna etc. Co. v. Whilldin*, 4 Harr. (Del.) 228; *Bestow v. United States Mail Co.*, 9 La. Ann. 268; *Philadelphia etc. R. R. Co. v. Kerr*, 33 Md. 331; *Mellon v. Smith*, 2 E. D. Smith, 462; *Butterfield v. Boyd*, 18 How. Pr. 526; *Mailler v. The Express Propeller Line*, 61 N. Y. 312; *Lockwood v. Lashell*, 19 Pa. St. 344; *Holmes v. Watson*, 29 Id. 457. In the last case cited, Lewis, C. J., delivering the opinion of the court, said: "Steamboats have means of keeping out of the way which other boats do not possess. The law exacts of them exertions to avoid injury proportionate to their powers." When a steamer and a sailing vessel are approaching each other from opposite directions, or on intersecting lines, from the moment the sailing vessel is first seen, the steamer must watch her course and movements with the highest diligence, so as to be able to adopt such timely measures of precaution as will prevent the two vessels from coming into collision: *The Carroll*, 8 Wall. 302; *Mailler v. The Express Propeller Line*, 61 N. Y. 312. So, too, a steamer must keep out of the way of barges propelled by oars: *Bigley v. Williams*, 80 Pa. St. 107. And a steamer is also bound to keep clear of a flat-boat floating with the current of a river: *Pearce v. Page*, 24 How. 228. But a steamer is not bound to get out of the way of a row-boat. The latter must get out of the steamer's way if it has time to do so: *Philadelphia & R. R. Co. v. Adams*, 89 Pa. St. 31; *The Missisquoi*, 8 Ben. 6.

DUTY OF SAILING VESSEL TO HOLD HER COURSE.—While it is the duty of a steamer approaching a sailing vessel to keep out of the way of the latter, she has the right to presume that the sailing vessel will keep her course and to govern her movements accordingly: *The Harriestown*, 14 Phila. 499; *The Rescue*, 24 Fed. Rep. 44. It is the imperative duty of the sailing vessel under such circumstances to keep on her course: *The R. B. Forbes*, 1 Sprague, 328; *The Gerard Stuyvesant*, 8 Ben. 183; *The Plymouth*, 26 Fed. Rep. 879; *The Carroll*, 8 Wall. 302; *The Scotia*, 14 Id. 170; *The Free State*, 91 U. S. 200; *The Illinois*, 103 Id. 298. The sailing vessel must not thwart the efforts of the steamer to keep out of her way, but must hold on in her course: *The William Young*, Olc. 38; *The Neptune*, Id. 483; *The Belgenland*, 14 Phila. 567; *The Wenona*, 8 Blatchf. 499; *The Adriatic*, 107 U. S. 512; *The Spring*, L. R. 1 Ad. & Ec. 99. The sailing vessel has no right to maneuver at all under such circumstances: *The Pilot*, 20 Fed. Rep. 80. If a sailing vessel is tacking against the wind, where there is sufficient sea-room to keep on, she is not at liberty to change her course or tack when approached by a steamer that is trying to keep out of her way. Nothing but urgent necessity will excuse her for luffing and changing her course in such a case: *The Clara Davidson v. The Virginia*, 24 Id. 763; *The Ellen Holgate v. The Illinois*, 13 Phila. 470. This rule does not, however, prevent her from changing her course to avoid immediate danger arising from natural obstructions to navigation. But when she has passed such obstructions, it is her duty to return again to her former course: *The John L. Hasbrouck*, 93 U. S. 405. A sailing vessel that sees the lights of a steamer nearly ahead on a dark and cloudy night has no right afterwards to change her course on the assumption that she had not been seen by the steamer: *The Scotia*, 5 Blatchf. 227. But a sailing vessel meeting a steamer may change her course if the danger of collision is imminent, and

she has reason to believe that by doing so she can avert or diminish the disaster: *Waldorf v. The Propeller New York*, 1 Flipp. 49.

SAILING VESSEL HAVING WIND FREE MUST KEEP OUT OF WAY OF ONE CLOSE HAULED. This rule is founded on the same reason as the rule already considered requiring a steamer to keep out of the way of a sailing vessel. The vessel having the wind free has control of her movements, and is therefore in a better position to keep out of the way than the one that is close hauled, and the law for that reason imposes upon her the duty of avoiding collision: *The Blossom*, Olo. 188; *The Argus*, Id. 304; *Allen v. Mackay*, 1 Sprague, 219; *The Clement*, Id. 257; *The John Stuart*, 4 Blatchf. 444; *The Osseo*, 16 Id. 537; *French v. The Victoria*, 10 Phila. 292; *The Nipoti Accame*, 14 Id. 517; *The Erastus Wiman*, 20 Fed. Rep. 245; *St. John v. Paine*, 10 How. 557; *Schooner Catharine v. Dickinson*, 17 Id. 170; *The Mary Housell*, L. R. 1 P. Div. 204; *The Peckforton Castle*, L. R. 3 P. Div. 11; *The Harriett*, 1 W. Rob. 182. On the same principle, a steamer unincumbered is bound to keep out of the way of a cumbersome tow: *The Magumba*, 21 Fed. Rep. 476. And where a square-rigged vessel and a schooner, both close hauled, are sailing upon convergent courses on the same tack, and the convergence is caused by the schooner's ability to lie nearer to the wind, she must give way: *The Clement*, 1 Sprague, 257.

SAILING VESSEL CLOSE HAULED IS BOUND TO KEEP ON HER COURSE, and not embarrass another having the wind free in her efforts to keep out of the way and avoid collision between them: *The Argus*, Olo. 304; *Allen v. Mackay*, 1 Sprague, 219; *The Bark Jupiter*, 1 Ben. 536; *Schooner Catharine v. Dickinson*, 17 How. 170; *The Mary Eveline*, 16 Wall. 348.

DUTY OF VESSEL OVERTAKING ANOTHER.—When one vessel is overtaking another, the general rule is that the former must keep out of the way of the latter: *Ervin v. Nevinsink S. B. Co.*, 88 N. Y. 184; *The W. H. Clark*, 5 Biss. 295; *The Naragansett*, 10 Blatchf. 475; *The Peter Ritter*, 14 Fed. Rep. 173; *Whitridge v. Dill*, 23 How. 448. Said Mr. Justice Clifford, delivering the opinion of the court in the case last cited: "Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead and pursuing the same general direction, if both vessels are close hauled on the wind, the vessel astern, as a general rule, is bound to give way or to adopt the necessary precautions to avoid a collision." The vessel that is being overtaken, however, owes the correlative duty to keep on her course and not change it unnecessarily: *The Ellen Holgate*, 13 Phila. 470; *The Grace Girdler*, 7 Wall. 196. It is the right as well as the duty of the vessel ahead to hold her course. She is not bound by law to turn to either side to let the pursuing vessel pass her. But she ought not to use her privilege intentionally to prevent the other from using her superior speed: *The Rhode Island*, Olo. 505; *McGrew v. The Melnotte*, 1 Bond, 453. It is the duty of a steamer, when about to pass a sailing vessel, to observe closely the course of the latter, as well as any conditions which may render a change of such course necessary, and to govern herself accordingly: *The Cynthia*, 14 Phila. 411. The rule requiring a vessel overtaking another to keep out of the latter's way applies until the overtaking vessel has completely passed the other: *Kennedy v. American S. B. Co.*, 12 R. I. 23. Where two vessels are sailing in company on the same tack, one ahead of the other, and the first one changes her tack, it is the duty of the one following her to change her tack also: *The Pricilla*, L. R. 3 Ad. & Ec. 125. When a vessel is both overtaking and crossing the course of another vessel, she is to be deemed an overtaking and not a crossing ship, and is bound to keep out of the other's way: *The Seaton*, L. R. 9 P. Div. 1.

IT IS DUTY OF VESSEL TO KEEP COMPETENT AND VIGILANT LOOKOUT on the forward part of the vessel where his view will be unobstructed. And this duty is rigorously enforced by the courts: *The Atlantic and The Ogdensburgh*, Newb. 139; *The Eri*, 3 Cliff. 456; *The Ancon*, 6 Saw. 118; *The Parkersburgh*, 5 Blatchf. 247; *The City of New York*, 8 Id. 194; *The America*, 10 Id. 155; *The Sam Rotan*, 20 Fed. Rep. 333; *The Belgenland*, 14 Phila. 567; *St. John v. Paine*, 10 How. 557; *Newton v. Stebbins*, Id. 586; *The Genesee Chief*, 12 Id. 443; *The New York v. Rea*, 18 Id. 223; *Chamberlain v. Ward*, 21 Id. 548, 570; *New York etc. Co. v. Philadelphia etc. Co.*, 22 Id. 461; *Hamcy v. Baltimore etc. Co.*, 23 Id. 287; *The Ottawa*, 3 Wall. 268; *Ward v. Ogdensburgh*, 5 McLean, 622; *Ward v. Armstrong*, 14 Ill. 283. When the night is dark and the vision is obstructed by mist, rain, or fog, it is especially important to keep a vigilant lookout to guard against approaching danger: *The Luna v. The Belgenland*, 14 Phila. 495. The lookout must be placed in the best position to see ahead: *The Kirkland*, 5 Hughes, 109. He must not be placed where his view will be obstructed by the sails: *The Java*, 14 Blatchf. 524; or by the steamer's chimneys: *The Magenta*, 2 Abb. U. S. 495. The person employed as a lookout ought to be free to give his whole attention to the duty he has to perform. The man at the wheel is not a proper lookout: *The Blossom*, Olc. 188; *The Parkersburgh*, 5 Blatchf. 247; *The Belgenland*, 14 Phila. 567; *Philadelphia etc. R. R. Co. v. Kerr*, 33 Md. 331; *Newton v. Stebbins*, 10 How. 586; *The Genesee Chief*, 12 Id. 443; *The Ottawa*, 3 Wall. 268; *The Hypodame*, 6 Id. 216. Nor is the captain or mate a sufficient lookout: *Bill v. Smith*, 39 Conn. 206; *The Empire State*, 2 Biss. 216; *The Tillie*, 13 Blatchf. 514; *The Sam Rotan*, 20 Fed. Rep. 333. The lookout is bound to report a light ahead as soon as he sees it: *The Fanita*, 14 Blatchf. 545. It is no excuse for the failure to keep a proper lookout that, owing to an accident, all hands had just been called aft to reef sails: *The Schooner Catharine v. Dickinson*, 17 How. 170; *Whitridge v. Dill*, 23 Id. 448. An ocean steamer going at full speed has no right to take away her lookout to clean decks: *The New Orleans*, 106 U. S. 13. And pilot-boats, like all other vessels, must maintain a vigilant and competent lookout stationed in a proper position: *The Blossom*, Olc. 188.

LOOKOUT ASTERN.—A vessel is not required to keep a lookout stationed where he can give notice of danger from vessels approaching in the same direction from behind: *Bruton v. Neversink S. B. Co.*, 23 Hun, 573, affirmed in 88 N. Y. 184. But when a steamer is backing out of her slip she is bound to maintain a proper lookout astern to see that she does no injury to neighboring craft: *The Nevada*, 17 Blatchf. 122; *S. C. on appeal*, 106 U. S. 154; *The Kirkland*, 3 Hughes, 641.

IT IS DUTY OF VESSEL IN MOTION TO AVOID ONE ANCHORED, aground, or moored to a wharf or proper landing-place: *Knowlton v. Sanford*, 52 Am. Dec. 649; *Simpson v. Hand*, 36 Id. 231; *Mills v. The Nathaniel Holmes*, 1 Bond, 352; *The Lady Franklin*, 2 Low. 220; *Commercial S. B. Co. v. Dutton*, 2 Cliff. 537; *The Palmetto*, 1 Biss. 140; *The Clara and The Clarita*, 5 Ben. 375; *Gaubert v. The George Bell*, 3 Hughes, 468; *Mercer v. The Florida*, Id. 488; *The Omega*, 13 Phila. 463; *The Rockaway*, 19 Fed. Rep. 449; *The Echo*, Id. 453; *Bill v. Smith*, 39 Conn. 206; *The Merrimac*, 14 Wall. 199. Where a vessel lying at anchor in a harbor, on proper ground, and showing the proper lights, is run into by a moving steamer, the presumption of fault in the latter is conclusive: *Mercer v. The Florida*, 3 Hughes, 488.

DUTY OF VESSEL AT ANCHOR.—It is duty of a vessel at anchor in the path of other vessels to keep an anchor-watch: *O'Neil v. Sears*, 2 Sprague, 52; *The Legia*, 4 Ben. 523; *The Indiana*, Abb. Adm. 330; *The Sapphire*, 11 Wall. 164;

The Clara, 102 U. S. 200. A vessel at anchor in a thoroughfare of other vessels is bound to keep a light: *Lenox v. Winisimmet Co.*, 1 Sprague, 160; *Simpson v. Hand*, 6 Whart. 311; S. C., 36 Am. Dec. 231; *Innis v. Steamer Senator*, 1 Cal. 459; S. C., 54 Am. Dec. 305. But see *Careley v. White*, 32 Id. 259. A vessel anchored in a rapid river should keep a watch: *Bussard v. The Petrel*, 6 McLean, 491. A vessel anchored in a comparatively narrow river must keep a watch, and not allow her sails to obscure her anchor-light: *The Worthington and The Davis*, 19 Fed. Rep. 836. A vessel lying at anchor in the fairway or roadstead of a navigable river, with no anchor-lights burning, and with a single lookout, and he asleep at the time when a steamer, without fault on her part, runs into her, is solely in fault: *Beyer v. Steamer Nurnberg*, 3 Hughes, 505. As a general rule, some person ought to be left on board a vessel while she is lying at anchor in a harbor, especially at a time when a gale is evidently coming on. And an omission to do so is a neglect of duty on her part: *The Lion*, 1 Sprague, 40. But an anchor-watch on board a vessel at anchor is not bound to take any active measures to get his vessel out of the way of another that is approaching in broad daylight, under full command, and moving at the rate of eight knots an hour: *The Lady Franklin*, 2 Low 220.

A vessel moored in the channel of a river near a large city, and at a place where vessels making a landing are likely to come, is bound to give the usual fog-signals in a heavy fog and snow-storm: *The Porter*, 2 Dill. 146. But a vessel at anchor is not, in the absence of a settled usage to that effect, bound to ring a bell in a snow-squall of a few minutes duration only: *The Bay State*, Abb. Adm. 235, 241, note; *The Rockaway*, 19 Fed. Rep. 449. A vessel anchoring in a river at night is bound to exercise great care to leave ample room in the channel for passing vessels. She should so locate the anchorage as to avoid any possible danger: *The Oscar Townsend*, 17 Id. 93. It is not the duty of a vessel at anchor to show a torch to an approaching steamer, when she has her anchor-lights properly set and burning, and the steamer can, by the exercise of due vigilance and the keeping of a proper lookout, see her without a torch: *The Avon*, 23 Id. 905. A steamship came in from sea and anchored in a thick fog in the Hudson river between New York city and Jersey City, and in the usual track of ferry-boats. A ferry-boat, on one of her trips, saw the steamer as she was dropping her anchor. On a subsequent trip she ran into the steamer, and the ferry-boat was held to be in fault, and the steamer not in fault: *The D. S. Gregory*, 6 Blatchf. 523. A vessel ought not, except impelled by necessity, to anchor in the regular path of river steamers, and if she is compelled to anchor there, she ought to remove as soon as the necessity for so doing has passed away: *Knowlton v. Sanford*, 52 Am. Dec. 649. Nor should she, except from necessity, anchor in a channel or entrance to a harbor: *The Sciota*, Davis, 359. A vessel came to anchor in the East river between New York and Brooklyn, in the path of the ferries. She was hailed by passing ferries, and requested to change her anchorage, but paid no attention to the request. A fog came up during the night, and one of the ferries, in the early morning, ran into her. It was held that the vessel was to blame in anchoring there in the first place, and in refusing to change her anchorage when requested so to do: *The Exchange*, 10 Blatchf. 168. A vessel lying at a wharf is bound to keep her anchor where it will not do any injury to passing vessels: *The Palmetto*, 1 Biss. 140; *The Kolon*, 9 Ben. 197. And a bark, while being towed through a canal, ought to keep her anchor where it can be let go at once: *The B. S. Sheppard*, Id. 221. A steamer in her dock, being aground and liable to careen, is not bound to attempt to keep herself close to the wharf by taut

cables, when the weight of herself and cargo is so great that something would be sure to give way: *Ward v. The Behera*, 14 Phila. 583.

DUTY OF VESSEL ABOUT TO LEAVE HER WHARF OR SLIP.—A large steamer leaving her moorings in a narrow slip is bound to take care not to start up her propeller in such a way as to endanger the safety of other vessels in the slip by the commotion created in the water by the screw. She must, if the safety of other craft in her neighborhood requires it, employ a tug to take her out: *The Nevada*, 17 Blatchf. 122. A steamer is in fault for setting her screw in motion without having a lookout astern to see that there is no vessel in the way to be injured thereby: *The Colon*, 8 Ben. 512. A steamer that starts her propeller while lying inside a slip, for the purpose of testing it before starting on her voyage, must be prepared to stop it immediately upon being hailed from other boats whose safety requires it: *The City of Macon*, 20 Fed. Rep. 159. A tug about to start from her moorings is bound to give the proper signals: *The Edmund Levy*, 8 Ben. 144. And a steamer about to start from her wharf should first give three long whistles: *The Kirkland*, 3 Hughes, 641. Where a tug lying in a slip is pressed by the tide against the side of a canal-boat, she is bound, before starting her engines, to push herself free from the canal-boat. And if she neglects this precaution and injury happens to the boat, the tug will be liable therefor: *The Titan*, 8 Ben. 7.

DUTY OF VESSEL ENTERING OR MOVING IN HARBOR.—A vessel about to enter a harbor is bound to exercise great care and caution to avoid collision with other vessels. Ordinary care is not, under such circumstances, enough. A steamer entering a harbor in the night-time or in a fog, is bound to move with great circumspection, or even to lie to or anchor, if the danger of encountering other vessels be great: *The Rose*, W. Rob. 1; *The Perth*, 3 Hagg. Adm. 414; *The Neptune*, Olo. 483; *The Bay State*, Abb. Adm. 235; *Ward v. The M. Dousman*, 6 McLean, 231; *The Badger State*, 15 Fed. Rep. 346; *Culbertson v. Shaws*, 18 How. 584. If a steamer entering a harbor at night, owing to any cause, cannot see her way clear before her, it is her duty to stop: *Wards v. The A. Roseller*, 6 McLean, 63. A steamer entering the harbor of Chicago at a time when it is crowded with other vessels ought not to move as fast as three and a half to four miles an hour: *Id.* If a propeller has to come up by a canal-boat lying at the end of a pier, she must come up easy so as not to injure the canal-boat: *The Harry*, 15 Fed. Rep. 161. Vessels moving in a crowded harbor are also bound to exercise great care and vigilance. If they are about to attempt any maneuver not usual and clearly safe, they must signify their intention, and see that their signals are clearly understood: *The Johnson*, 9 Wall. 146; *The State of Texas*, 20 Fed. Rep. 254. They must also keep a strict and vigilant lookout, and if they see a vessel approaching, they must stop, and, if necessary, reverse: *The City of Paris*, 9 Wall. 634. A vessel moving in the harbor of New York is bound to move at no headway not entirely controllable: *The Corsica*, *Id.* 630; *The City of Paris*, *Id.* 634. Ferry-boats crossing harbors of commercial ports at night, or in a fog, are bound to proceed with great caution: *Amoskeag Mfg. Co. v. The John Adams*, 1 Cliff. 404. Ferry-boats crossing crowded harbors between fixed stations at regular intervals have not the exclusive right of way over their usual tracks or courses. They must keep out of the way of sailing vessels, and must slacken speed and stop to avoid collision: *The Manhasset*, 5 Hughes, 104.

DUTY OF VESSELS NAVIGATING EAST RIVER.—By the statutes of New York, steamboats, in passing up and down the East river, are bound to go as near as practicable in the center of the river, except in going into or coming out from their usual berths or landings; and steamboats meeting each other in

the river are required to go to that side which is to the starboard, so as to enable them to pass each other with safety. And these statutes forbid steamers to keep close to the shore in going round the Battery either way: *The Maryland*, 19 Fed. Rep. 551. Ferry-boats in crossing the East river must maintain a vigilant watch: *The Monticello*, 15 Id. 474. Tugs navigating that river must not run by the ends of the piers: *The Relief*, Olc. 104. Where a tug, with a tow, is rounding the Battery within the eddy, and within three or four hundred feet from the shore, another tug with a tow upon a hawser coming down and crossing within the ebb tide has no right to cross the bow of the former in order to run between her and the New York shore, both from the inherent danger of such a maneuver, and the established usage of boatmen in rounding the Battery: *The E. A. Packer*, 20 Fed. Rep. 327. A ferry-boat in the East river is bound to keep at least twenty yards away from a lighter: *The Warren*, 18 Id. 559. A steamer crossing or coming on to the track of ferry-boats in the East river is bound to special watchfulness: *The Relief*, Olc. 104.

DUTY OF VESSEL IN FOG.—Vessels are bound to move in a fog with great care and circumspection, and to proceed at a moderate rate of speed, so that they can be easily stopped upon the approach of danger: *The Zadok*, L. R. 9 P. Div. 114; *The Beta*, Id. 134; *The Bristol*, 10 Blatchf. 537; *The Shady Side*, 17 Id. 132; *The Chancellor*, 4 Ben. 153; *Leonard v. Whitwell*, 10 Id. 638; *The City of New York*, 15 Fed. Rep. 624; *Morrison v. The Petaluma*, 1 Saw. 128. The theory that full speed is the safest speed cannot be accepted by the court in such circumstances: *Clare v. Providence etc. Co.*, 20 Fed. Rep. 587. The criterion of moderate speed is the condition of the vessel to be stopped immediately upon the appearance of danger ahead: *The Leland*, 19 Id. 771; *The Eleonora*, 17 Blatchf. 88. It is the duty of a sailing vessel as much as of a steamer to go at a moderate rate of speed in a fog: *The John Hopkins*, 13 Id. 185; *The Virgin*, 2 W. Rob. 201; *Guibert v. The George Bell*, 3 Hughes, 468. A steamer proceeding in a fog is bound to go as slowly as she can go, and maintain proper steerage way: *The Westphalia*, 24 L. T., N. S., 75. Bowen, L. J., delivering the opinion of the court in the case of *The Beta*, L. R. 9 P. Div. 135, said: "The term 'moderate' is a relative term; it depends on place, on the kind of ship, and on the kind of fog. In a dense fog in the Bristol channel it is clear that a vessel must not go faster than will enable her to be kept under command." Eight to eight and a half miles an hour in a dense fog in the night-time, on Lake Michigan, upon the great thoroughfare of lumber vessels, is an immoderate rate of speed: *The Leland*, 19 Fed. Rep. 771. So is seven knots an hour in a very dense fog, two hundred miles from Sandy Hook, in the track of inward and outward bound vessels: *The Pennsylvania*, 19 Wall. 125. Seven and a half knots an hour on George's Bank is too fast: *The Lepanto*, 21 Fed. Rep. 651. Nine knots an hour for a revenue cutter, in the absence of pressing emergency, in a sea where she will probably meet a number of coasting vessels, is an unjustifiably high rate of speed in a fog: *Prescott v. United States*, 19 Ct. of Cl. 684. A propeller moving at the rate of five to six knots an hour at night in a thick fog on Lake Huron is going too fast: *The Colorado*, 91 U. S. 692. Seven miles an hour in a fog is entirely too fast, where the vessel is surrounded by sailing vessels: *The Manistee*, 7 Biss. 35. Twelve and a half knots an hour in a dense fog seven hundred miles from land, no extra precautions being taken, is not a moderate rate of speed: *The Europa*, 2 Eng. L. & Eq. 557. Seven and a half knots an hour in a dense fog off the east end of Long Island is not moderate speed: *Leonard v. Whitwell*, 10 Ben. 638. Nine and a half knots in a fog is not moderate: *The Hansa*, 5 Id.

501. More than eight knots an hour in the South Vineyard channel in a dense fog is immoderate: *The Blackstone*, 1 Low. 485. A steamer going sixteen to seventeen miles an hour in a fog on Long Island Sound, in the direct track of the coasting trade, is grossly at fault: *McCready v. Goldsmith*, 18 How. 89. Fifteen miles an hour in such a place is immoderate: *The Rhode Island*, 17 Fed. Rep. 554. A steamer has no right to run as high as eight miles an hour on a river in a thick fog: *The Omega*, 5 Hughes, 487. A steamer at sea running eight miles an hour in a fog is not running at the moderate speed required by the act of congress: *The City of Panama*, 5 Saw. 63. A speed of ten and a half knots an hour in a dense fog is an immoderate rate for a steamer, even in mid-ocean: *The Marathon v. The Andrew Hicks*, 24 Fed. Rep. 653. Moderate speed means reduced speed: *The City of Atlanta*, 26 Id. 456.

It is the duty of a steamer going in a fog, with unabated speed, in the track of coasting craft, when hailed, to order her engines stopped immediately: *The Perth*, 3 Hagg. Adm. 414. A steamer, upon hearing the fog signal of an invisible vessel, should stop at once, without waiting for her to come into sight: *The Anna*, 14 Phila. 521. If the sound of a fog whistle comes apparently from a definite direction, a steamer is justified in steering away from it; but if it seem near, she is bound, at her peril, to stop and reverse at once: *The Lepanto*, 21 Fed. Rep. 651. When two steamers are approaching from opposite directions in a fog, it is the duty of both to check speed, and if necessary, to stop and back: *The Atlantic and The Ogdensburgh*, Newb. 129. A ferry-boat moving in a fog must lie to and anchor, if there is great danger of her colliding with other vessels: *Hoffman v. Union Ferry Co.*, 68 N. Y. 385. In a dense fog, it is the duty of a steamer to stop and anchor as soon as circumstances will permit her: *The Otter*, L. R. 4 Ad. & Ec. 203. It is the duty of a canal-boat tying up in a fog to select the berme-bank. If she takes the tow-path side she must take sufficient precautions to warn approaching boats, either by a strong light or by timely hails: *The City of Milwaukee*, 14 Fed. Rep. 365.

DUTY OF STEAMER TO SLOWEN SPEED.—A steamer is bound to move at such a moderate rate of speed as will enable her to stop and reverse her engines in time to prevent a collision with another vessel, after discovering her: *The Rose*, 2 W. Rob. 1; *The Virgil*, Id. 201; *The James Watt*, Id. 270; *The Empire State*, 2 Biss. 216; *The Free State*, 91 U. S. 200. A large steamer without incumbrance, approaching near to a smaller one with tows, is bound to slacken speed and move with caution. Seventeen miles an hour is too great a speed to move at under such circumstances: *The Syracuse*, 9 Wall. 672. A steamer not well under the control of her helm, approaching a sailing vessel in the night-time in a narrow channel, nearly end on, at the rate of nine knots an hour, is bound to slacken her speed: *The Blenheim*, 14 Fed. Rep. 797, affirmed in 17 Id. 608. A steamboat has no right to run past the mouth of a ferry-slip at so high a rate of speed that she cannot stop in time to avoid striking a ferry-boat, in case one comes out: *The D. R. Martin*, 10 Ben. 532. A steamer descending the St. Clair river at night, and seeing a vessel's lights below her, is bound to slacken her speed, where she is going at the rate of eight miles an hour: *The Indiana and the Buffalo*, Newb. 115. A tug has no right to run in a crowded thoroughfare, like the Chicago river, at the rate of over five miles an hour: *The Little Giant*, 2 Biss. 23. A steamer coming down a river on a dark night and meeting a sailing vessel beating up, and being in doubt as to the latter's course, should slacken her speed until she ascertains the course of the sailing vessel: *The James Watt*, 2 W. Rob. 270. If a steamer

discovers the light of an approaching sailing vessel, and then loses it, it is her duty to check speed and even to stop, if necessary, until she finds it again: *The Illinois*, 6 Blatchf. 256. It is the duty of the deck officer of a steamer to know the rate at which his vessel is going, and if he neglects for two minutes after he sees a vessel approaching, his vessel will be held liable for the collision: *Prévost v. United States*, 19 Ct. of Cl. 684.

WHEN VESSEL OUGHT TO BE STOPPED.—A steamer that cannot be steered ought to be stopped: *The Minnie R. Childs*, 9 Ben. 200. It is the duty of a steamer in a fair and proper anchorage-ground in a very dense fog to come to anchor as soon as she can: *The Otter*, L. R. 4 Ad. & Ec. 203. A steamer seeing a sailing vessel approaching her, and seeing her lights fluctuating, ought to stop until the sailing vessel's course is definitely ascertained: *The Westover*, 5 Hughes, 133. But a sailing vessel is not bound by any general rule to lie to or to shorten sail because the night is so dark that an approaching vessel cannot be seen: *The Morning Light*, 2 Wall. 550. And where the yellow fever has disabled the most of a vessel's crew, she may, nevertheless, proceed on her voyage, taking reasonable precautions to avoid danger of collision: *The Southern Home*, 16 Blatchf. 449.

TUG AND TOW.—A tug and her tow are regarded in law as one vessel, and that under steam, and they are therefore bound to keep out of the way of a sailing vessel: *The Civilla and the Restless*, 103 U. S. 699; *The Sam Rotan*, 20 Fed. Rep. 333; *The Herbert Manton*, 14 Blatchf. 37. A tug engaging to tow a vessel into port is bound to use reasonable skill and care in everything relating to the work until it is accomplished. She is bound to know the channel of her home port, how to reach it, and whether in the state of the wind and water it is safe and proper to attempt to enter with a tow: *The Margaret*, 94 U. S. 494. But if the channel is shifting, she is excusable for not knowing where it is: *The Mosher*, 4 Biss. 274. It is the duty of a tug undertaking to tow other vessels to see that the tow is properly made up, and that the lines are strong and securely fastened: *The Quickstep*, 9 Wall. 665; *The Sweepstakes*, 1 Brown, 500. A tug has the right, and it is her duty in general, to manage the helm of the vessel she is towing, to the end that the vessel may aid in accomplishing the undertaking: *The South-west and the L. P. Smith*, 2 Flipp. 79. The vessel being towed is also bound to use all necessary precautions to avoid collision with other vessels: *The Carolus*, 2 Curt. 60; *The Margaret*, 2 Flipp. 640; *The Ackerman*, 9 Ben. 179; *Arctic Ins. Co. v. Austin*, 69 N. Y. 470. It is the duty of a tug with a tow lashed to her side to see that the sails of the tow do not obscure the tug's lights, so as to become invisible to a small schooner low down in the water: *The Conboy*, 5 Hughes, 143. A steam-tug has the right, as an act in extremis, to put herself between her tow and a schooner about to strike her, to ward off the blow of the schooner: *The George L. Garlick*, 20 Fed. Rep. 647. A tug has the right to remain stationary, or nearly so, in the East river while making up a tow in the usual place, if she leaves room enough for vessels to pass on either side: *The William H. Payne*, Id. 650.

DUTY OF VESSELS TO SHOW LIGHTS.—It is of course the duty of all vessels to carry the lights prescribed and required by the rules for preventing collisions at sea. A green and a red light placed in the center of a schooner with only a board between them do not fulfill the requirements of the act of congress: *The Empire State*, 2 Biss. 216. A steamer is bound to show proper lights to a sailing vessel, in order to make the latter liable for not exhibiting a torch to the steamer: *The New Orleans*, 9 Ben. 303. And a sailing vessel must avoid showing a confusion of lights to an approaching steamer: *The Huntsville*, 8 Blatchf. 228. A vessel's lights must not be placed where they

will be obscured by the sails, or shut out by the swell of the ship: *The Johanne Auguste*, 21 Fed. Rep. 134. A vessel with her anchor down, but not actually holden by it, is "under way," and bound to exhibit colored lights: *The Esk. The Gitana*, L. R. 2 Ad. & Ec. 350. A steam-tug towing other vessels, if she has no mast to carry two white lights at the head of, must carry two bright white lights vertically, of a character to be visible five miles away on a dark night with clear atmosphere, and so constructed as to show a uniform light ahead, and from ten points on one side to ten points on the other side of the tug: *The Jesse Williamson, Jr.*, 17 Blatchf. 106. A derrick-boat lying by a pier of an unfinished bridge in a navigable river is bound to keep a light at night: *The Alabama*, 26 Fed. Rep. 866. A vessel anchored in a thoroughfare for passing vessels in a dark night is bound to keep a light: *The Sciota*, Daveis, 359; *Lenox v. Winsimmet Co.*, 1 Sprague, 160; *Innis v. Steamer Senator*, 54 Am. Dec. 305.

DUTY TO SHOW TORCH.—It is the duty of a sailing vessel, seeing or hearing a steamer approaching her in the night-time, to exhibit a torch in the direction in which the steamer is seen or heard. Nothing but an absolute certainty that it will do no good will absolve the sailing vessel from the duty of obedience to this rule: *The New Orleans*, 9 Ben. 303; *Leonard v. Whitwill*, 10 Id. 638; *The Parkersburgh*, 5 Blatchf. 247; *The Eleonora*, 17 Id. 88; *The Oder*, 21 Id. 26; *The Sarmatian*, 2 Fed. Rep. 911; *The Naragansett*, 3 Id. 251; S. C., 11 Id. 918; *The Samuel H. Crawford*, 6 Id. 906; *The Alabama*, 10 Id. 204; *The Roman*, 12 Id. 219; S. C., 14 Id. 61; *The Pennsylvania*, 12 Id. 914; *The John Hopkins*, 13 Id. 185; *The Hercules*, 17 Id. 606; *The Lizzie Henderson*, 20 Id. 524; *The Algiers*, 21 Id. 343.

DUTY TO ANSWER SIGNAL.—A vessel signaled is bound to answer promptly, either assenting or dissenting: *The Garden City*, 19 Fed. Rep. 529; *The Mary Ida*, 20 Id. 741. But a steamer who has signaled her intention to pass to the left has no right to proceed to carry out such intention until she has received an answer assenting to that course. She has no right to assume that silence gives consent: *The Johnson*, 9 Wall. 146; *The Milwaukee*, Brown Adm. 313; *The Louis Dole*, 5 Biss. 172; *The E. H. Coffin*, 16 Blatchf. 421; *Erwin v. Neversink S. B. Co.*, 88 N. Y. 184; *The Franconia*, 3 Fed. Rep. 397; *The Delaware*, 6 Id. 195; *The Hudson*, 14 Id. 489; *The Garden City*, 19 Id. 529; *United States v. Keller*, Id. 633; *The Pannonia*, 26 Id. 106.

RIGHT OF VESSELS TO MOOR AT PUBLIC WHARVES is as much to be protected as that of navigation itself, but it must be exercised with due regard to the rights of passing vessels: *The St. Laurence*, 19 Fed. Rep. 328; *The Worthington* and *The Davis*, Id. 836.

DUTY OF VESSELS NAVIGATING NARROW CHANNELS.—When vessels are passing through narrow and dangerous channels, they must take extra precautions to avoid collision: *The Milwaukee*, Brown Adm. 313; *The Columbia*, 9 Ben. 254; *The Massachusetts*, 10 Id. 177; *Newton v. Stebbins*, 10 How. 586; *The Scots Greys v. The Santiago de Cuba*, 19 Fed. Rep. 213; *The Rescue*, 24 Id. 44.

DUTY OF VESSEL APPROACHING BRIDGE.—Where in a high and uncertain state of the wind a vessel is approaching the piers of a bridge, between which she cannot pass safely if the wind is squally, it is her duty to lie by till the wind has gone down, and she can pass safely: *The Mohler*, 21 Wall. 230. A steamer approaching a bridge is bound to keep a lookout: *Baltimore etc. R. R. Co. v. Wheeling etc. Co.*, 32 Ohio St. 116.

OWNER OF VESSEL LAUNCHING HER is bound to take all proper precautions to conduct the operation with the utmost care, and he must give due

and reasonable notice to all vessels that may be passing at the time: *The Vienna*, Swab. 406; *The Glengarry*, 2 Asp. M. L. Cas., N. S., 230; *The Adalustian*, L. R. 2 P. Div. 231; *The Blenheim*, 4 Notes of Cases, 393; *Malster v. Humphreys*, 5 Hughes, 180, and note 189.

FACT THAT VESSEL IS COMPELLED TO TAKE PILOT does not relieve her from liability for injury done by her in colliding with other vessels: *The China*, 7 Wall. 53; *The Merrimac*, 14 Id. 199; *The Alabama*, 1 Ben. 476; *Camp v. The Marcelhus*, 1 Cliff. 481; *Saulter v. New York etc. Co.*, 88 N. C. 123; S. C., 43 Am. Rep. 736.

FACT THAT VESSEL IS CARRYING MAIL does not excuse her for any violation of the laws of navigation: *The Vivid*, Swab. 88; *Haney v. The Louisiana*, Taney, 602.

NONSUIT, WHEN SHOULD AND WHEN SHOULD NOT BE GRANTED: See *Phillips v. Brigham*, 71 Am. Dec. 227, note 229, where prior cases are collected.

WHERE BOTH VESSELS ARE AT FAULT in case of collision, neither can recover at common law: *Union S. S. Co. v. Nottinghams*, 17 Gratt. 123, citing the principal case. See also *Broadwell v. Swigert*, 45 Am. Dec. 47, and note 53, where this subject is discussed.

PATTEN v. NORTHERN CENTRAL RAILWAY COMPANY.

[88 PENNSYLVANIA STATE, 426.]

OWNER OF LAND THROUGH WHICH RAILROAD RUNS IS NOT ENTITLED TO COMPENSATION for the increased rates of insurance which he may have to pay because of the danger to his property from locomotives.

FACT THAT OWNER OF LAND TAKEN FOR RAILROAD HAS USE OF OTHER RAILROADS already will not justify the jury in considering that the proposed road will be of no benefit to him.

JURY, IN ESTIMATING DAMAGES TO OWNER OF LAND TAKEN FOR RAILROAD, cannot consider that by the taking he is deprived of the advantage of keeping off others from his neighborhood, and thus saving himself from the annoyance and risk of their proximity; nor that he will suffer inconvenience and delay by having to convey his manufactures across the railroad, and by reason of the obstruction of trains passing along it.

INDIVIDUAL PROPERTY IS EXCLUSIVE AS AGAINST INDIVIDUALS, but not as against society. It is not of grace, but of duty, that individual rights yield to social ones.

PROCEEDING under statute for assessment of damages sustained by the construction of the defendants' road through the plaintiff's land. The facts appear from the opinion.

J. A. Fisher and McCormick, for the plaintiff in error.

J. C. Kunkel, for the defendants in error.

By Court, LOWRIE, C. J. Under the instructions given to the jury, the plaintiff might have recovered for the market value of his land taken for the road; for the value of his buildings removed; for injury by cutting his land into portions that were

inconvenient in shape, or inconveniently separated by deep cuts or embankments; and for any difficulty or diversion of a private road, occasioned by the construction of the railroad above or below its grade; and he did recover for these matters, so far as the jury thought that any damage was proved.

He now complains that there were other injuries, for which the court did not allow him to recover any compensation. His objections to the trial are not all stated in the clearest manner, and before considering them, respectively, we shall define them as we understand them.

1. The plaintiff insists that he ought to have been allowed compensation for the increased rates of insurance which he has to pay because of the danger to his property from locomotives.

We have already decided that the occasioning of such risk by the lawful use of property is not an injury, in the sense of a wrong done to another: *Peter v. Hunsiker*, 28 Pa. St. 202; *Sunbury & E. R. R. Co. v. Hummell*, 27 Id. 99. And we did not base this conclusion merely on the impossibility of calculating the risk in advance for all future circumstances. But if we had done so, that impossibility is not disproved by showing the present rates of insurance under the now existing circumstances. Insurance does not make that certain which was before uncertain. It merely assumes the risk of defined circumstances, for a compensation based upon an approximate calculation of chances, and is itself a mere speculation upon assumed uncertainties. Besides this, a man who is not liable for accidental fire cannot be liable to insure against it.

2. Another objection is, that the jury ought to have been allowed to consider that the defendants' railroad is of no benefit to the plaintiff in his business there, because he has already the use of two other railroads.

We think that this objection is sufficiently answered by what we lately decided in *Searle v. Lackawanna and Bloomsburg Railroad Company*, 33 Pa. St. 57, and we need only refer to that.

Other objections involve one single principle, and they may be stated together, thus:

3. That the jury ought to have been allowed to consider, as elements of damage, that by the taking of his land for the road the plaintiff is deprived of the advantage of keeping off others from his neighborhood, and thus saving himself from the annoyance and risk of their proximity; and that he suffers

inconvenience and delay by having to convey his hides and leather across the railroad, and by reason of the obstruction of trains passing along it.

This objection is essentially anti-social in its principle, and forgets that as in man himself, so in man's title to land, there are two necessary elements, the individual and the social. Private right and public right, individual property and eminent domain, are perfectly consistent elements of the one thing, property in land.

Those who are engaged in a contest for damages to land, caused by the construction of public improvements, are prone to forget the social element that is involved in all private titles; yet it is recognized in every system of rights, by such branches of law as those relating to eminent domain, public improvements, mortmain, devises, inheritances, entailments, perpetuities, and the like, and in such maxims as, *Sic utere tuo ut alienum non lædas*. All these are based on the principle that private right involves some elements of social right. Individual property is exclusive as against individuals, but not as against society. Without society it cannot exist, and without a well-organized society it is almost worthless.

Organized society, the state, has rights as well as duties, and unless its rights are maintained its duties cannot be performed. A people passes from tyranny to freedom by insisting on individual rights as against government; and this habit, once acquired, may endure long after it has served its purpose; and then organized society, the state, is deprived of part of the powers that are necessary for its efficiency. When freedom is once achieved, individual duties become quite as worthy of consideration as individual rights. For the safety of the social bond, and for the efficiency of social action, as well as for individual improvement, they may need to be chiefly considered.

Social rights may receive a general definition in advance of any given social organization, but they can never admit of a definite application in advance. They depend on society with reference to its density, and its internal and external business relations, and cannot be fully defined in their application in anticipation of these. The greater its social activity, the more numerous are its social wants, for it must have the means of acting. Internal war brings the most intense social activity, and the greatest yielding of individual to social rights.

No social want or social right is more obvious than that of avenues of intercourse. And from its very nature, this right

must receive its application after the want has developed itself by the growth of society. Thus roads in certain directions and over specified lands become a social right, subject to the countervailing duty to compensate the individual for the pecuniary loss which he suffers for the benefit of society. This is simply a practical assertion of the social and individual character of all that belongs to humanity. It is not of grace, but of right, that society exercises such functions. It is not of grace, but of duty, that individual rights yield to social ones.

And society cannot possibly regard its own prosperity, and its activity and closeness of intercourse, as a damage to individuals; for then society would be thus far anti-social. That it should treat its own public thoroughfares as a private nuisance is impossible. To pay a man because its public improvements induce a high degree of public prosperity, and cause his neighborhood to be too thickly settled, and beget great activity of commercial intercourse through his land, would surely seem like an almost absurd yielding to selfish and anti-social claims.

Chestnut street, Philadelphia, was once a quiet road through a country village, with its grass but little worn by travel; now it requires caution, and often considerable delay, to cross safely through its hurrying crowds; but the owners of property along it are not paid by the public for such inconveniences. All such matters are placed to the account of the social element in man receiving its due development, and interfering with the individual element only so far as this ought to give way for its own and the general good. None of the grievances here stated can be recognized as an injury to the plaintiff. If the defendants unlawfully obstruct his business by trains standing in his way, he can have redress in the ordinary form.

These remarks seem to us to meet all the questions raised in the case. We discover no error in the trial.

Judgment affirmed, and record remitted.

MODE OF ASCERTAINING COMPENSATION TO OWNER OF LAND TAKEN FOR PUBLIC USE: See *Brown v. Beatty*, 69 Am. Dec. 389, note 396, where other cases are collected. The actual value of the property taken at the time when taken, and not any future or fancied value that it may have after imagined improvements are made, is what the owner of land taken for a railroad is entitled to: *Dorland v. East Brandywine & W. R. R. Co.*, 46 Pa. St. 526, citing the principal case. Upon the exclusive appropriation of a part of the property, the inconvenience arising from divisions, or from increased difficulty of access, and the additional necessary fencing, are direct and immediate results of the construction of the railroad, and entitled to be compensated: *Western*

Pa. R. R. Co. v. Hill, 56 Id. 465; *Wilmington etc. R. R. Co. v. Stauffer*, 60 Id. 379, both citing the principal case. But damages apprehended from the possible destruction of property by fire through the carelessness of the company's agents in operating the road, are too remote to be taken into the estimate: *Fremont etc. R. R. Co. v. Whalen*, 11 Neb. 585, also citing the principal case; see also *Johnson v. Atlantic etc. R. R. Co.*, 69 Am. Dec. 560, and note 564.

WHETHER BENEFITS CAN BE OFFSET AGAINST DAMAGES in taking property for public use, see *Symonds v. Cincinnati*, 45 Am. Dec. 529, note 532, where this subject is discussed at some length; *Nichols v. City of Bridgeport*, 60 Id. 636, note 648; *Henderson & N. R. R. Co. v. Dickerson*, 66 Id. 148, note 153; *Brown v. Beatty*, 69 Id. 389, note 396. In *East Pa. R. R. Co. v. Hottelstine*, 47 Pa. St. 30, it was said, citing the principal case, that courts allow the amount of the preponderating advantages to stand against the value of the property taken, or other specific injury done.

MENGES v. DENTLER.

[83 PENNSYLVANIA STATE, 495.]

ALL JUDICIAL POWER IS BY CONSTITUTION VESTED IN COURTS OF JUSTICE, and its exercise by the legislature is prohibited.

LAW WHICH GIVES CHARACTER TO CASE, AND BY WHICH IT IS TO BE DECIDED, is the law that is inherent in the case, and constitutes a part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated.

LAW ENACTED AFTER CASE HAS ARISEN CAN BE NO PART OF IT; such a law can have only a forced and unnatural relation to the case, and must produce an untrue decision, one not of the case arising between the parties, but of a case partly created by the legislature.

ACT OF ASSEMBLY VALIDATING SHERIFF'S SALE, DECLARED BY SUPREME COURT TO BE INVALID, is unconstitutional and void.

IF, IN ACTION OF EJECTMENT, SUPREME COURT ESTABLISHES RULE OF LAW which is conclusive in favor of the title claimed by one party in whose favor the case is thereupon decided, and afterwards, and before a new suit is instituted to try the title, the successful party sells the land to a *bona fide* purchaser for value, and after that the supreme court discovers that the rule by which they established the title is an untrue one, and that the case ought to have been decided so as to give the land to the other party, the title of the original unsuccessful party must be treated as lost.

EJECTMENT. The facts are sufficiently stated in the opinion.

Donnel, Johnson, and Maynard, for the plaintiff in error.

G. F. Miller, for the defendant in error.

By Court, LOWRIE, C. J. The title to this land was once, in due course of law, declared to be in the heirs of Solomon Menges, against the title claimed by George Oyster under a sheriff's deed, purporting to convey it as the property of their

father. Afterwards an act of assembly was passed the twenty-fourth of April, 1843 (Pamph. Laws, 362, sec. 11), declaring that sheriff's deed valid, in so far as the supreme court had declared it invalid. Then the controversy was renewed, and the act of assembly was decided by the supreme court to be constitutional, and Oyster's title was sustained: *Menges v. Wertman*, 1 Pa. St. 218. Now again the controversy is renewed, and we are asked to declare the act of assembly unconstitutional, and to restore the heirs of Menges to their original rights.

It is very apparent that in the case of *Menges v. Wertman*, *supra*, the court yielded to the force of the legislative will with great doubt, hesitation, and dislike, and by a bare majority. They afterwards repudiated the doctrine then admitted, by expressing their regret for the decision: *Dale v. Medcalf*, 9 Pa. St. 110; *Greenough v. Greenough*, 11 Id. 495 [51 Am. Dec. 567]; *Lycoming v. Union*, 15 Id. 172 [53 Am. Dec. 575]; and by making several decisions contrary to it: *Lambertson v. Hogan*, 2 Id. 22; *Brown v. Hummel*, 6 Id. 87 [47 Am. Dec. 431]; *De Chastellux v. Fairchild*, 15 Id. 18 [53 Am. Dec. 570]; *Snyder v. Bull*, 17 Id. 58; *McCabe v. Emerson*, 18 Id. 111. See also *McCarty v. Hoffman*, 23 Id. 507; *Stuber's Road*, 28 Id. 200; *Lauman v. Labanon V. R. R. Co.*, 30 Id. 48 [72 Am. Dec. 685].

The bill of rights, sections 9 and 11, declares that no man shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land; and that the courts shall be always open to every man, so as to afford remedy by due course of law for all invasions of rights; and that right and justice shall be therein administered without sale, denial, or delay. It seems to us that these provisions of the constitution were entirely overlooked when the act of assembly alluded to was passed, and when the case of *Menges v. Wertman*, 1 Pa. St. 218, was decided; for to our minds they most plainly forbid both the act and the decision. They leave no shadow of doubt about the general class of functions which fall under the denomination of judicial power, and which are vested by the constitution in the courts of justice. They declare that all claims for justice between man and man shall be tried, decided, and enforced exclusively by the judicial authority of the state, and by due course of law.

These provisions are taken from Magna Charta; but they have higher value here than in England, just as a constitution adopted by the people is of higher value than a mere act of

parliament. Parliament may disregard Magna Charta, but our legislature must obey the constitution. These provisions are, therefore, imperative limitations of legislative authority, and imperative impositions of judicial duty. To the judiciary they say, You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say, You shall not intermeddle with such functions. In England, these words prohibited the king from interfering with judicial proceedings, so as to exclude all royal arbitrariness, and insure that cases should be decided by law. Here, they prohibit all legislative and executive interference, for the same reasons.

That this may more distinctly appear, let us endeavor to get a clear view of the thought intended to be expressed by the phrases, "by due course of law," and "by the law of the land." So far as they relate to the forms of remedy, we need only say that no one can justly complain of a change in them, after the arising of his cause of action, provided an adequate remedy is still allowed him. There is a more fundamental thought involved in these words.

The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated.

If I find a man possessed of a title to land, with all the conveyances duly recorded, and with no conveyance recorded from him to any other person, and I know of none, I may safely buy the land; though, in fact, another person holds an unrecorded conveyance; for the law that such unrecorded and unknown conveyance is invalid is an inherent part of my case, and my case is changed if that be changed in it, or stricken out of it. My case cannot be decided by due course of law, apart from the particular law, statutory or customary, that constitutes part of it, and gives it class and character. In the very nature of things, a law that is enacted after the case has arisen can be no part of the case. Such a law can have only a forced and unnatural relation to the case, and must produce an untrue decision—a decision, not of the case arising between the parties, as it ought to be, but of a case partly created by the legislature.

When, therefore, the constitution declares that it is the ex-

clusive function of the courts to try private cases of disputed right, and that they shall administer justice "by the law of the land" and "by due course of law," it means to say that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in its substance, by any subsequent law.

This view of these constitutional provisions may cast doubt upon several decisions to be found in our reports. Some of them are acknowledged to be erroneous, and others are exceptional, and must stand on their exceptional principles. The cases, recognizing the laws curing defective certificates of acknowledgment of deeds of married women, and other kindred cases, may be reconciled with the constitution (without rejecting other reasons), by treating the certificate as not an inherent part of the contract, but as a means of proving it, the strict form of which being dispensed with, leaves the instrument to the support of the legal presumption, *omnia rite acta esse*.

We are therefore bound to declare that the act of assembly passed for the purpose of deciding this controversy as it originally arose constitutes no part of the present case, and cannot be allowed to influence our judgment relative to the effect of the sheriff's deed to Oyster. In strict law, it does not tend to validate that deed so far as it purports to convey land in Northumberland county. If the deed had no such validity when made, the act of assembly could give it none.

Must we then declare that the plaintiff is entitled to recover this land from the defendant? This does not follow; for the case has been materially changed by the judicial proceedings that have taken place under the act of assembly. In the former case, it was the relation between Menges and Oyster that was to be decided. In the present one, it is the relation between Menges and a *bona fide* purchaser under Oyster; and now the former decision of the supreme court, and the fact of a fair purchase on the faith of it, become important elements of the case.

Now, the case presents itself thus: If, in an action of ejectment, a rule of law is established by the supreme court, which is conclusive in favor of the title claimed by one party, and the case is thereon decided in his favor, and if, afterwards, and before a new suit is instituted to try the title, the successful party sells the land to a *bona fide* purchaser for value, and after that the supreme court should discover and decide that

the rule by which they had established the title was an untrue one, and that it ought to have been decided so as to give the land to the other party—in such a case, must the title of the original unsuccessful party be treated as lost?

We feel constrained to decide this question in the affirmative. In strict law, the title remains; but in equity, it is lost; and this is a sort of equity which the courts alone can properly declare and administer. It is quite plain that the present title depends upon faith in that department of government which alone may deal with such a subject, and upon the good faith of government in protecting those that trust in it. Men naturally trust in their government, and ought to do so, and they ought not to suffer for it.

This is acting in conformity with ordinary experience, and with the appearance of things as sanctioned by the highest civil authorities; and it is a plain moral duty of government to protect such acts. This duty is the most obvious moral element on which the doctrine of *stare decisis* is founded; and when this doctrine must be departed from, the courts ought to see that no transaction that is evidently based upon it should be affected by the departure. The same element is involved in the practice of allowing amendments of mistakes of the courts or their officers, so as not to affect third persons; in the doctrine that sales made under judgments are valid, even though the judgments should afterwards be annulled and set aside for error; in the doctrine that the officers of the courts are protected in executing the orders and judgments of the courts, even though erroneous; in the doctrine that the confirmation of a sheriff's deed cures all mere irregularities in the proceeding; in the doctrine that conveyances, void or voidable in law or equity, for fraud or mistake, are yet sustained in the protection of *bona fide* purchasers; in proceedings *in rem* for the benefit of all concerned, where a sale of the thing passes the title, however erroneous the judgment; and in the doctrine that justifies and protects obedience to a government in fact, though not in right. Indeed, it is an essential principle of government; for if the right to trust to the highest governmental functionaries is denied, and such trust is unprotected, every man is bound to question every act of government that affects him, and to resist whatever he does not approve—a doctrine that would make government impossible.

There is no equality of equities between these parties. The

controversy between Menges and Oyster turned upon a single principle of law, and they submitted that to the umpirage of the state, through its appropriate functionaries, and argued it as well as they could, and they were bound by the decision, whether it was right or wrong, so long as it stood in force; for, necessarily, the state is the final mediator in all controversies, and it cannot do better than express itself according to the degree of intelligence of its functionaries. A citizen may suffer by mistakes of government; and so he may by his own or by those of his private agents, or of his family or copartners or friends. They cannot be corrected at the expense of others.

For the purposes of this case, the decision in *Menges v. Wertman*, 1 Pa. St. 218, must be treated as correct, and therefore there is no error in this judgment.

Judgment affirmed.

LEGISLATURE HAS NO POWER TO MAKE VOID PROCEEDING VALID: See *McDaniel v. Correll*, 68 Am. Dec. 587. The legislature has no judicial power to confirm title to land: *Spragg v. Shriver*, 64 Id. 698, note 703. The legislature cannot exercise judicial functions: *Parsons v. Tuolumne County Water Co.*, 63 Id. 76, note 77; *Galy v. Hermance*, Id. 85, note 86, where prior cases in this series are collected. The legislature has no power to take the property of one man and give it to another: *Grim v. Weissenberg School District*, 57 Pa. St. 436; *Richards v. Rote*, 68 Id. 256, both citing the principal case.

LAW OF CASE AT TIME WHEN IT BECAME COMPLETE is an inherent element in it, and if changed or annulled, the right is annulled and justice is denied, and the due course of law is violated: *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 277, citing the principal case.

ALL CLAIMS FOR JUSTICE BETWEEN MAN AND MAN MUST BE TRIED BY JUDICIAL AUTHORITY of the state and by due course of law: *Craig v. Kline*, 65 Pa. St. 413, citing the principal case.

WHATEVER COURTS DO DIRECTLY TOWARDS TRANSMISSION OF TITLE must be regarded as conclusive until set aside in some lawful and constitutional way: *Wickersham v. Savage*, 58 Pa. St. 369, citing the principal case. And a party has a right to rely on the law as declared by the supreme court: *Wadhams v. Gay*, 73 Ill. 424, also citing the principal case.

THE PRINCIPAL CASE IS REFERRED to in *Reiser v. William Tell S. F. Ass'n*, 39 Pa. St. 145, in support of the statement that the supreme court of Pennsylvania has repented of having yielded to mere arbitrary legislative interpretation.

VAUGHEN v. HALDEMAN.

[33 PENNSYLVANIA STATE, 522.]

GAS-FIXTURES ATTACHED TO GAS-PIPES ARE NOT FIXTURES, and do not pass by a sheriff's sale of the real estate.

CASE stated for the opinion of the court on the following facts: In 1846 the defendant purchased a brick house, and moved into it with his family. In 1853 he had gas-pipes introduced into the house, and attached thereto in the usual way the chandeliers and brackets in question in this case. In 1856 the premises were sold under an execution against the defendant and purchased by the plaintiff, who received a sheriff's deed therefor. Haldeman, before removing from the premises, detached said chandeliers and brackets and carried them away. It was agreed that if the court should be of opinion that Vaughen, the purchaser, was legally entitled to the said chandeliers and brackets, judgment should be entered for the plaintiff, otherwise for the defendant. The court below gave judgment for the defendant.

Stevens and North, for the plaintiff in error.

Fordney and Reynolds, for the defendant in error.

By Court, READ, J. Lamps, chandeliers, candlesticks, candleabra, sconces, and the various contrivances for lighting houses, by means of candles, oil, or other fluids, have never been considered as fixtures, and as forming a part of the freehold. There is no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures.

This is still the law; but it is supposed that the introduction of carbureted hydrogen gas may have changed the character of the apparatus, because it must be connected with the pipes through which the gaseous fluid is brought into the building. If such were the case, it would establish two different rules in relation to the same subject, depending entirely upon the medium used to produce light.

The first gas-works were established in London, fifty years ago; and in 1835 the first ordinance was passed by the city of Philadelphia for their erection, since which period they have been gradually introduced into the cities, towns, and villages of the interior. The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fix-

tures, for the purpose of lighting the rooms and entries. These are called gas-fittings; whilst the chandeliers, and other substitutes for the oil lamps and candles, are called gas-fixtures, and are screwed on to the pipes and cemented, only to prevent the escape of gas; and may be removed at pleasure, without injury either to the fittings or to the freehold. There is, therefore, really nothing to distinguish this new apparatus from the old lamps, candlesticks, and chandeliers, which have always been considered as personal chattels.

Gas-stoves are largely used for bath and other rooms, and are necessarily connected with the gas-pipes in the same way; but no one would think of saying that they were fixtures, which it would be waste to remove. It is, therefore, more simple to consider all these gas-fixtures, whether stoves, chandeliers, hall and entry lamps, drop-lights, or table-lamps, as governed by the same rule as the articles for which they are substituted.

We find no reported decisions on this subject in the English courts; but there have been some cases in our sister states bearing directly upon this question. In *Lawrence v. Kemp*, 1 Duer, 363, it was decided that gas-fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant; and in *Wall v. Hinds*, 4 Gray, 256 [64 Am. Dec. 64], the supreme court of Massachusetts held that a lessee could take away gas-pipes put in by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the rooms by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

The case now before us seems to have been directly decided in *Montague v. Dent*, 10 Rich. L. 135 [67 Am. Dec. 572], in December, 1856, by the court of appeals of South Carolina. Under a sale to foreclose a mortgage, a house and lot were sold, and a few days afterwards the sheriff, under executions against the mortgagor, removed and sold certain gas-chandeliers and pendent hall gas-burners, and the court held unanimously that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the freehold. The reasoning of the court appears to us to be decisive of the present case, the only difference being that the house here was sold under a judgment, and not under a mortgage.

By "A supplement to an act entitled 'An act relating to the

lien of mechanics and others upon buildings,' passed the sixteenth day of June, *Anno Domini* one thousand eight hundred and thirty-six," which was passed the fourteenth of April, 1855 (Pamph. Laws, p. 238), it is enacted "that from and after the passage of this act, the several provisions of the act, to which this is a supplement, be and the same are hereby extended to plumbing, gas-fitting and furnishing, and erection of grates and furnaces."

By referring to the senate journal of 1855, it appears that the first section of this bill was amended in the senate by striking out all after the word "to" in the seventh line, and inserting in lieu thereof the words as follows, viz.: "plumbing, gas-fitting, furnaces, and furnace buildings" (p. 167); and upon the passage of the bill, by the unanimous consent of the senate, it was amended in the first section by striking out of the eighth line the words "furnaces, and furnace buildings," and by inserting in lieu thereof the words "and furnishing, and erection of grates and furnaces." Notwithstanding, therefore, the punctuation of the act, the word "gas-fitting" stands alone, the furnishing and erection of grates and furnaces relating to an entirely different subject.

It is not necessary to place a construction upon this act, because in the present case the fittings and fixtures were introduced into an old house; but it would seem reasonable that it should be confined to what is generally understood by the words "gas-fitting."

For these reasons, in addition to those assigned by the court below, the judgment must be affirmed.

GAS-FIXTURES ARE NOT FIXTURES: See *Montague v. Dent*, 67 Am. Dec. 572, note 575, where other cases are collected; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 41, citing the principal case.

NORTH LEBANON RAILROAD COMPANY v. McGRANN.

[88 PENNSYLVANIA STATE, 580.]

PARTY LITIGANT MAY, IF HE WILL, REFER TO HIS ADVERSARY, or to any one interested adversely to himself, and such submission will be enforced. WHERE CONTRACT FOR CONSTRUCTION OF RAILROAD PROVIDES THAT DECISION OF CHIEF ENGINEER OF COMPANY SHALL BE FINAL and conclusive in any dispute that may arise between the parties thereto touching the same, the person who fills the office of chief engineer when the adjudication is called for is the proper person to decide, and not the person who filled the office at the time the contract was made, but who had

resigned before the necessity for adjudication arose. And if the company fail to appoint a chief engineer, the contractor may resort to the courts of law.

DEBT on an award in favor of McGrann & Co., made by James Worrell, late chief engineer of the defendants. The facts are stated in the opinion.

Franklin and Reynolds, for the plaintiffs in error.

Keenan, Fordney, and Stevens, for the defendants in error.

By Court, STRONG, J. The only question in this case which needs examination is, whether, under the contract of the parties, James Worrell was competent to make the award, which has been made the foundation of the plaintiffs' recovery. Mr. Worrell was the chief engineer of the defendants during the whole period in which the plaintiffs were performing their part of the contract. He made out monthly estimates for them, and on the twentieth of October, 1854, the work having been completed, he made out a final estimate, showing the cost of the whole road at the contract prices, and the amount due to the plaintiffs, after deducting the payments which had been made to them. Mr. Worrell continued to be chief engineer of the company until the seventh of September, 1857, when the board of directors accepted his resignation previously made. Notwithstanding the final estimate of the engineer, differences arose between the plaintiffs and defendants as to the amount due to the former, and in 1855 an action was brought in the common pleas of Lancaster county to enforce payment of the sum which the plaintiffs alleged to be due to them. This suit was subsequently discontinued. On the twenty-seventh of October, 1857, after Mr. Worrell had ceased to be chief engineer of the defendants, the plaintiffs applied to him to adjudicate upon the dispute between them and the defendants, under a clause in the contract by which the parties had agreed to refer any difference which might arise between them to the arbitrament of the chief engineer. Mr. Worrell consented to the application, and disregarding a protest by the defendants against his authority, made the award upon which this suit is brought. The stipulation in the contract was in the following words: "And it is mutually agreed, and distinctly understood, that the decision of the chief engineer shall be final and conclusive in any dispute that may arise between the parties to this agreement, relative to or touching the same; and each and every of said parties do hereby waive any right of action,

suit or suits, or other remedy in law, or otherwise, by virtue of said covenants, so that the decision of said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said party."

We do not think that the plaintiffs, by bringing their suit at law in 1855, relinquished any rights which they had under the contract to an award by the chief engineer of the company, nor that Mr. Worrell's final estimate, made October 20, 1854, was such an award as was contemplated by this clause of the contract. The point of divergence between the parties was the alleged incorrectness of this final estimate. But did the parties agree that Mr. Worrell might adjudicate between them, after he had ceased to be chief engineer?—though doubtless his award would have been final if made during the continuance of his official relation. It is not a question of fitness or unfitness of the arbitrator. The inquiry relates solely to the contract of the parties. In stipulating as they did, that the chief engineer should be the umpire between them, it may well be that it was supposed the engineer would, better than others, understand the merits of any controversy that might arise. But it was also well known that the engineer was an officer of the company, paid by them, and that he held his office at their pleasure. The purpose of the agreement of submission was, therefore, not alone to select the most competent arbitrator, but to intrust the decision of any dispute to one whose very position was one of dependency upon the company. We have nothing to do with the prudence of such an agreement. It is ours to enforce the contract as the parties have made it. A party litigant may refer to his adversary, if he will, or to any one interested adversely to himself. Such a submission will be enforced: *Matthew v. Ollerton*, 4 Mod. 226; *Hunter v. Bennison*, Hardres, 43; *Kyd on Awards*, 72; *Monongahela Navigation Company v. Fenlon*, 4 Watts & S. 205; *Faunes v. Burke*, 16 Pa. St. 480 [55 Am. Dec. 519]. That the agreement was not to refer to Mr. Worrell, as Mr. Worrell, cannot be doubted. He was not named. The submission was to be to an officer, competent by virtue of his office. It is true that when the contract was signed Mr. Worrell was the chief engineer, but had he resigned the next day, his successor, undeniably, would have been the appointed umpire. So, if there had been a succession of chief engineers, he alone could have awarded who was in office when the adjudication was called for; and this, though his superintendence of the work might have been far less than

that of any of his predecessors. This contingency must have been foreseen when the parties contracted, and it evidences clearly that the umpirage was intended to be inseparable from the office of chief engineer. Fitness, therefore, was at most but a minor consideration. The company retained the right to have the claims of the contractors against them determined by one of their own officers; by one who at the time of deciding should stand in an official relation to them. It was doubtless an advantage, but it was one conceded by the plaintiffs, and it is one which is usual in such contracts.

In *Ranger v. Great Western Railway Company*, 27 Eng. L. & Eq. 35, there was a stipulation in a contract that during the progress of the work the decision of the principal engineer, with respect to the state, amount, and condition of the work actually executed, and as to every other matter or thing relating thereto, should be final and without appeal. In remarking upon this in the house of lords, the chancellor (Lord Cranworth) said "that was, in fact, a stipulation that the questions should be decided by the company." He added, that "the contract did not hold out, or pretend to hold out, to the appellant that he was to look to the engineer in any other character than as the impersonation of the company. . . . It is to be observed that the person to decide was not a particular individual, in whom, notwithstanding his relations to the company, the contractor might have so much confidence as to agree to be bound by his award, but any one, from time to time, the company might choose to select as their engineer." Lord Brougham, in the same case, treated this reference to the engineer as a reference to the company. I am not prepared to assent to this unqualifiedly, but I cannot doubt that the design of the stipulation is to give to the company the advantage of having a decision made by one of their own officers or agents. Entertaining this view of the contract, we are constrained to hold that when Mr. Worrell's resignation as chief engineer was accepted, he ceased to be competent to act as an umpire between the parties, and that his subsequent award was without authority. Certainly, where a naked power is given *virtute officii*, it cannot be exercised by one who does not hold the office.

But it is said there was no other tribunal to decide the controversy between the parties; that there was no chief engineer other than Mr. Worrell. If the fact be so, that did not make him engineer after his resignation and its acceptance. But it

is a mistaken assumption that there was no other tribunal. If the company failed to appoint a chief engineer after Mr. Worrell's resignation, if they thus prevented the settlement of the dispute by the stipulated reference, the plaintiffs were at liberty to resort to the courts of law.

The judgment of the court of common pleas is reversed, and judgment is entered for the defendants in the court below.

THOMPSON, J., dissented.

PARTIES AGREEING TO SUBMIT TO DECISION OF CHIEF ENGINEER ARE BOUND THEREBY: See *Farnce v. Burks*, 55 Am. Dec. 519.

HOY v. GRONOBLE.

[34 PENNSYLVANIA STATE, 9.]

PROFITS THAT WOULD HAVE BEEN MADE IMMEDIATELY OUT OF CONTRACT may be recovered in an action for the breach thereof; the loss of such profits is not consequential and too remote; they are in the immediate contemplation of the parties when the contract is made.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO EMPLOY PLAINTIFF TO CULTIVATE FARM ON SHARES is what he could have made on the farm.

INSTRUCTION THAT JURY MAY ALLOW DAMAGES "FOR VIOLATION OF FAITH," upon breach of contract, is erroneous, for such damages, being additional to compensation, would be vindictive.

ASSUMPSIT by Gronoble against Hoy, to recover damages for breach of contract. The defendant excepted to the instruction of the court concerning the measure of damages, and assigned the same for error. The verdict was for two hundred and fifty dollars. The opinion states the case.

Linn, for the plaintiff in error.

Hall, for the defendant in error.

By Court, **STRONG, J.** The plaintiff below brought suit to recover damages for a breach of a parol contract, by which the defendant engaged to employ him to cultivate a farm upon shares. The only questions raised in this court relate to the proper measure of damages. The plaintiff having, through the alleged default of the defendant, failed in obtaining the employment, the learned judge of the common pleas instructed the jury that his damages were to be measured by what he could have made on the farm, and that besides these, they might

allow him damages for violation of faith. This instruction, it is contended, was erroneous.

There are few subjects more difficult than the proper rule by which damages are to be estimated. It is often said that in actions founded upon contracts, the rule is compensation. But this practically amounts to very little. What is compensation? In many contracts, the parties have themselves fixed the measure. In many others, the contract furnishes no standard, and it is impossible to prescribe any general rule which shall in all cases give to a plaintiff a precise equivalent for what he would have enjoyed if the contract had not been violated. Without attempting to deduce from adjudicated cases any rule of universal application, it may suffice, for the present, to refer to a few principles that seem to be supported by the better authorities. While it is well settled that a jury are not at liberty to allow mere speculative damages, yet there are cases in which a plaintiff has been held entitled to what he would have made had the contract been fulfilled; I mean, to what he would have made immediately out of the contract.

The loss of such profits is not consequential, in the sense in which consequential damages are sometimes said to be too remote. They are in the immediate contemplation of the parties when the contract is made. Thus, in contracts for the sale and delivery of goods at a designated time or place, the damages are measured by the price of the goods on the day named, or at the place specified, if there be a failure on the part of the vendor. This is, in effect, making him responsible for profits. This subject has received a very thorough discussion in New York, in *Masterton v. Mayor of Brooklyn*, 7 Hill, 62 [42 Am. Dec. 38]. That was a case in which the plaintiffs had agreed to furnish marble for the city hall of Brooklyn, for which the defendants agreed to pay as the work progressed. After a portion of the marble had been delivered, the defendants refused to receive any more, and the plaintiffs brought covenant for a breach of the contract. They were allowed to recover the profits they would have made from the actual performance of the contract. The court, while denying the right of the plaintiffs to remote and contingent damages, or to profits of collateral enterprises in which they might have been induced to engage on the faith of the contract with the defendants, remarked that "profits or advantages, which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. They are

part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation." This is also the doctrine of *Fox v. Harding*, 7 Cush. 516; *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 307; *Cook v. Commissioners of Hamilton*, 6 McLean, 612; *Richardson v. Mellish*, 2 Bing. 229. So, also, it is held in this state that in an action for a breach of a covenant to sell land, a plaintiff is entitled to recover damages for the loss of his bargain, beyond the money paid with interest, unless the breach of the covenant has not been in consequence of the fraud or bad faith of the vendor: *Bitner v. Brough*, 11 Pa. St. 127. Indeed, the principle does not appear to have been denied. The contest in the reported cases has been, whether the loss of the bargain is not a proper subject to enter into the estimate of damages, even where there was no fraud or breach of faith. In *McClowry v. Croghan*, 31 Id. 22, the measure of damages for the breach of a contract to lease was declared to be the same as for a breach of a contract to sell; as indeed it must be, for a lease is but a partial sale, the rent being the consideration. We cannot say, therefore, that the jury were misled in this case by being told that the damages of the plaintiff would be measured by what he could have made on the farm. This was but another mode of saying that he was entitled to the value of his bargain. The worth of that was what it would have yielded, deducting, of course, the value of the labor necessary to be bestowed.

But we think there was error in charging the jury that "besides allowing these damages" (what the plaintiff could have made on the farm), they might also allow damages "for violation of faith." This is something more than compensation. It is an allowance of vindictive damages which is not permitted in actions for a breach of contract, with very rare exceptions, perhaps in none except the single case of breach of promise of marriage. The violation of most contracts involves a breach of faith. If a promisor must respond in damages for that as well as for his violation of his promise, he must make duplicate satisfaction. The learned judge was led into the mistake by a *dictum* of Judge Rogers, in *Holler v. Weiner*, 15 Pa. St. 242. In that case, there was no question raised respecting the constituents of the damages. The contest was in regard to the plaintiff's right to recover any particular damage which he had suffered. The doubt was whether there was any evi-

dence of any damage. Judge Rogers, in delivering the opinion, after having shown what was the contract and how it had been violated, remarked: "This is an obvious wrong, for which the plaintiff is entitled to damages, as well for the breach of the contract as for the violation of faith." To hold that it was intended by this to warrant the recovery of damages for breach of faith, in addition to those which result from violation of the contract, would be a perversion of the meaning of the judge. His only purpose was to show that some damages were recoverable, and the ground was either breach of the contract or its synonym—violation of faith. The case, therefore, does not sustain the instruction which was given to the jury in the present action.

The judgment is reversed, and a *venire de novo* awarded.

LOSS OF PROFITS AS DAMAGES: *Simmons v. Brown*, 73 Am. Dec. 60, and note citing prior cases 73; *Abbott v. Gatch*, 71 Id. 635. For breach of a contract to let a farm on shares, the measure of damages is what the plaintiff could have made on the farm: *Wolf v. Studebaker*, 65 Pa. St. 461, citing the principal case. An employee for a determinate period, if improperly dismissed before the term of service has expired, is *prima facie* entitled to recover the stipulated compensation for the whole time; though the defendant may show in mitigation of damages that the plaintiff was engaged in other profitable employment during the term, or such employment was offered him and refused: *King v. Steirn*, 44 Id. 102, citing the principal case. Merely speculative profits cannot be recovered: *McKnight v. Ratcliff*, Id. 169, citing the principal case.

DAMAGES FOR BREACH OF CONTRACT MUST BE NATURAL AND PROXIMATE CONSEQUENCES OF BREACH: *Ash v. De Rossett*, 72 Am. Dec. 552, and note citing prior cases 554; *Abbott v. Gatch*, 71 Id. 635. Where a vendor has not acted in good faith, the vendee can recover for the loss of his bargain: *Mason v. Kaise*, 67 Pa. St. 132, citing the principal case.

MARKS'S APPEAL.

[24 PENNSYLVANIA STATE, 86.]

DEBTOR WHOSE CLAIM TO EXEMPTION IN LANDS LEVIED ON IS DISREGARDED by the sheriff, who, without appraisement, proceeds to sell the lands, is not entitled to any portion of the proceeds. His sole remedy is against the sheriff.

TO ENTITLE DEBTOR, UNDER CLAIM TO EXEMPTION IN LANDS LEVIED ON, to three hundred dollars in money out of the proceeds of the sale, an appraisement must be had, and it must appear that that amount in value of land could not be set off to him without injury to or spoiling the whole.

APPEAL from decree distributing the proceeds of a sheriff's sale of the real estate of Abraham Andrews. Against him

Margaret Marks, the appellant, obtained a judgment on April 5, 1858; Albert Hine obtained another with a waiver of the benefit of the exemption law on April 9, 1858; and Augustus Filbert still another also, with a waiver of the exemption law, on April 12, 1858. Upon the last judgment execution issued and was levied upon the real estate of Andrews. Before the inquisition the defendant, Andrews, made a claim for the benefit of the exemption law. No appraisement was held, however, and the sheriff sold the property levied on, and after the payment of undisputed liens there remained out of the proceeds of the sale a balance for distribution, which was not sufficient to satisfy the judgments of either Filbert or Hine, and amounted to but little more than the judgment of the appellant, Marks. The court decreed this balance to Hine, on the ground that his judgment contained a waiver of the exemption law. Margaret Marks appealed from this decree.

Rhoads and Davis, for the appellant.

Banks, for the appellee.

By Court, THOMPSON, J. The decree of distribution in this case was made without the usual reference to an auditor, and we have only such facts stated as the counsel for the appellant thought material to the presentation of his case. This is unsatisfactory. The report of an auditor, or a case stated, may present the facts in an authentic form without the testimony on which they are found, but in no other way can they be satisfactorily presented here. But as the appellee does not dispute the facts set forth by the appellant, we may consider those material in the case as conceded. If there be any error in this, it is not our fault.

It appears that a demand for the benefit of the exemption law was made by the debtor to the sheriff after levy and before inquisition. But it also appears that the sheriff, for some reason not stated, held inquisition and sold, without complying with the request of the debtor for an appraisement. Could the debtor, under such circumstances, claim his exemption out of the money in court? We think not. The law deals with his demand as an election to have his exemption in land, and he could only take the money in lieu of land if that amount in value of land could not be set off to him by the appraisers without injury to or spoiling the whole. All this must appear to entitle him to the three hundred dollars in money. But nothing of this appears. There was no appraisement; no at-

tempt to set off any land, and no report that it could not be set off. The sale was allowed to proceed without appraisement, and without objection by the debtor. It has been settled in more than one case that the debtor, under such circumstances, where there has been no appraisement, cannot come in and elect to take money without having first failed, according to the test of the law, to get land: *Weaver's Appeal*, 18 Pa. St. 307; *Hammer v. Freese*, 19 Id. 255. That was just the case here. There was no appraisement, and nothing but the demand. It is no answer to say that the debtor has done his duty in making the demand, and the officer has disregarded it. It is not likely that a court would permit a sale of land in disregard of the debtor's request for appraisement, if objection were made in time. But whether or not, the debtor would, if wronged by the disregard or neglect of the officer, be entitled to recover to the extent of his injury against him: *Hammer v. Freese*, *supra*; *Freeman v. Smith*, 30 Pa. St. 264.

Whatever may have been the reason operating on the sheriff in disregarding or neglecting the request made by the debtor in this case for appraisement, taking it to have been made, it is certain, as resulting from it, that the debtor had no money in court that he could claim under and by virtue of the exemption laws. This being so, there was no reason for controversy between Mrs. Marks's judgment and that of Albert Hine. The former was entered several days prior to the latter, and was entitled to satisfaction out of the money in court in the order of priority in which it stood. The precise question, therefore, relied on by the appellee, as entitling him to the money, is not reached in this view of the case.

And now, to wit, June 30, 1859, the decree of the court of common pleas of Berks county distributing the sum of one hundred and fifty-nine dollars, claimed by Margaret Marks on judgment No. 638, of January term, 1858, to judgment No. 747, January term, 1858, is reversed; and it is decreed that the said sum of one hundred and fifty-nine dollars be distributed to and paid on said judgment of the said Margaret Marks, No. 638, of January term, 1858; and that the appellee pay the costs of this appeal.

IF EXEMPTION IS WAIVED IN JUDGMENT, SHERIFF IS NOT BOUND TO REGARD IT: *Bowman v. Smiley*, 72 Am. Dec. 738.

REMEDY OF DEBTOR WHOSE EXEMPTION RIGHTS HAVE BEEN DISREGARDED: See note to *Van Dresar v. King*, *post*, p. 643.

MERKLEIN v. TRAPNELL.

[24 PENNSYLVANIA STATE, 42.]

DECREE OF ORPHANS' COURT IN PARTITION OF DECEDENT'S REALTY awarding the land to one of the heirs is conclusive as to the title, and cannot be collaterally impeached, if the court had jurisdiction of the subject-matter, and there be no fraud.

ORPHANS' COURT HAS JURISDICTION TO DECREE PARTITION OF DECEDENT'S REALTY, notwithstanding a lapse of twenty-six years since his death, if there has been no adverse possession.

GRANTEE OF ONE OF HEIRS, WHOSE DEED HAS NOT BEEN RECORDED, is not entitled to notice of partition proceedings; nor is the record of a mortgage from the grantee to his grantor constructive notice of title in such grantee.

IT IS NO OBJECTION TO DECREE OF PARTITION OF DECEDENT'S REALTY that the heirs were not in the actual possession of the premises at the time of partition awarded, if the possession was vacant in fact, for in such case the possession is deemed to be in the heirs.

EJECTMENT. The opinion states the case.

Evans and Mayer, for the plaintiff in error.

Chapin and T. E. Cochran, for the defendants in error.

By Court, THOMPSON, J. Casper Carver, the common source of title, died seised of the land in dispute, about the year 1800 or 1801, leaving six children his heirs. George, the eldest, in process of time, became the owner, by purchase and as heir, of five sixths of the shares in the land, and in 1810 sold the interest thus acquired to Baltzer and John Foust. The deed of George to them contained an exception of one fifth, being the interest of Michael Carver, a son of Casper Carver, deceased, which he had not purchased. This deed is dated in April, 1810, but not recorded until in 1856. The Fousts executed to the vendor a mortgage of the same date as the deed for the purchase-money, which was recorded on the fourteenth of April, 1810. The mortgagors occupied the premises five or six years, paid no purchase-money, left, and never afterwards returned or claimed the land.

George Carver died in 1814, leaving several children his heirs. In 1826, Edwin Lungren, of Chester county, purchased the Michael Carver interest from his heirs, as well as the shares of several of the heirs of George Carver, deceased, acquiring in all sixteen twenty-fifths of the whole interest of which Casper Carver died possessed. In 1827 he applied by petition to the orphans' court of York county for partition of the estate between the heirs of Casper Carver, deceased, which

was awarded; and the property, not being divisible in the opinion of the inquest, was appraised at seven hundred and fifty dollars. Situated thus, it was claimed by and decreed to Lungren, who held the share of the eldest son of George Carver, deceased, who was the eldest son of Casper Carver, at the valuation. The proceeding being consummated, Lungren entered into possession of the premises, and died in 1827. The property was then sold by order of the orphans' court for the payment of debts due by his estate to Alfred Lungren, for the sum of three thousand dollars. His title was afterwards divested in 1834 by a sale on a mortgage given for purchase-money, and bought by James Lewis, and by sales on execution at several times, as well as by sundry private assurances, it eventually became vested in the heirs of Thomas B. Coleman, under whom the defendants directly claim title. They, and those under whom they claim, have been in possession of the premises from 1827 until suit brought in 1858.

The plaintiff's title rests on a sheriff's sale of the premises, as the property of Baltzer and John Foust, on proceedings to foreclose the mortgage to George Carver, by his administrators, in 1843, to John Evans, for two hundred and four dollars. The sheriff's deed is dated and acknowledged the sixth of August, 1845. And the title thus acquired the purchaser conveyed, on the twelfth of October, 1857, to the plaintiff.

The plaintiff having given in evidence this title, the defendants then set up title under the proceedings in partition in the orphans' court in 1827, and decree of the premises to Edwin Lungren, and title from him, as already stated.

The learned judge of the common pleas, on the presentation of the case, instructed the jury that as the orphans' court of York county had jurisdiction in the matter of the partition of the real estate of Casper Carver, deceased, and had proceeded therein to final decree, their action, remaining unappealed from, was conclusive; that the title under it was the better title, and that the plaintiff could not recover.

This instruction is complained of as error: 1. Because of the lapse of time (twenty-six years) since the death of Casper Carver, before the proceedings in partition were had; 2. Because of want of notice to the Fousts, the purchasers from George Carver; 3. Because the heirs of Casper Carver were not in possession of the premises at the time of partition awarded.

To these positions it is answered: 1. That there was no

statute of limitations to bar such proceedings, in the absence of adverse possession; 2. That there was no deed on record, nor possession by the Fousts, or any one claiming under them, so as to indicate any claim in them calling for notice; and that the mortgage by them to George Carver was not constructive notice of title, to a purchaser from the heirs; 3. That at the time of inquest awarded, the possession was vacant, in fact; and in this condition, the legal title being in the heirs, the law deems the possession in them. The facts asserted in these positions being uncontroverted, we think the legal deductions are also well stated.

The able argument of the defendant in error proved very clearly that the learned judge was accurate in considering the case as settled by the proceedings in partition. The orphans' court had undoubted jurisdiction of the subject-matter, and consequently their decree was, when made, as conclusive as the judgment of any other court of record. Every element and requisite necessary to the making of the adjudication must be presumed to have been present when we are looking at it collaterally. The decree, therefore, awarding the land to the representative of the heir first entitled to choose, was a mode of conferring title, and until directly impeached, is conclusive, unless fraud or want of jurisdiction appear to deprive it of this effect. We find nothing of this nullifying character in the case. The act of the court became the foundation of a title unquestioned for nearly twenty years—and never directly questioned—during which time the property has once passed to a purchaser at orphans' court sale, and more than once under process out of the common pleas. It then comes to be assailed by a sale on a mortgage dated in 1810, payable in twenty-eight years, without anything to show title in the mortgagors, with no payment of purchase-money during the whole of this period, and for the seven years after the last payment fell due, before suit brought on it.

The case is before us on the conclusiveness of the decree in partition. The proceedings, consummated, operated as an assurance by matter of record, and being an adjudication by a court of competent jurisdiction, cannot be impeached collaterally, for anything, as has been said, but fraud or want of jurisdiction. This is settled in numerous cases: *Herr v. Herr*, 5 Pa. St. 428 [47 Am. Dec. 416]; *Painter v. Henderson*, 7 Id. 48; *Lockhart v. John*, Id. 137; *President of the Orphans' Court of Dauphin County for the Use, of Groff v. Groff*, 14 Serg. & R. 181;

McFadden v. Geddis, 17 Id. 336; *Gratz v. Lancaster Bank*, Id. 278; and *Lair v. Hunsicker*, 28 Pa. St. 115. The act of the twenty-ninth of March, 1832, sec. 2, Pamph. Laws, 190, in which it is enacted that the orphans' court is a court of record, whose decrees "in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court," was simply declaratory of the law as it stood, as abundantly appears from the case of *McPherson v. Cunliff*, 11 Serg. & R. 430 [14 Am. Dec. 642], and in several of the cases already cited. We need not pursue the point. The court had jurisdiction, and the proceedings cannot be assailed for the alleged irregularities, as attempted here; the record of the proceedings was rightly admitted, and properly held to be conclusive.

The case of *Williams v. Landman*, 8 Watts & S. 55, in no manner militates against the doctrine of the conclusiveness of the proceedings contended for in this case. The proceedings there had never been completed, and no final decree had passed. It is difficult to conceive how such imperfect proceedings could have been thought to have been an estoppel in favor of the party claiming under them. Hence the remark of Mr. Justice Huston, "that a party can make title to himself by filing a petition in court, any more than by writing a letter, is so absurd that I cannot suppose such an idea ever was for a moment entertained by the judge."

We do not think it necessary or important to consider the objections to one or two of the conveyances of the heirs. It is possible they would turn out to be mere irregularities, at most, not objected to by the parties to them. It is enough to say, however, that the petitioner held interests that were superior to objection, and upon them had a right to call for partition.

As we discover no error in the record, the judgment must be affirmed.

Judgment affirmed.

DECREE OF PARTITION CANNOT BE COLLATERALLY IMPRACHED by a stranger: *Graasmeyer v. Beeson*, 70 Am. Dec. 300, and note. The decree in partition may be termed a "mode of conferring title;" but it is only the title of the heirs that is conferred, and the land may afterwards be sold for the payment of the decedent's debts under order of court: *Dresher v. Allentown Water Co.*, 52 Pa. St. 229, citing the principal case.

PETITIONER IN PARTITION MUST HAVE RIGHT OF POSSESSION: Note to *Nichols v. Nichols*, 87 Am. Dec. 703. Remaindermen and reversioners cannot compel partition: Id. 713.

ALL PERSONS INTERESTED ARE NECESSARY PARTIES IN PARTITION SUIT: *Portis v. Hill*, 65 Am. Dec. 99, and cases cited in the note 109; *Vick v. Mayor*

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etc. of Vicksburg, 31 Id. 167. In *Thompson v. Still*, 56 Pa. St. 156, 160, it is held that partition proceedings and a decree therein passed no title to the interest of a purchaser of an heir's interest in the property at a sheriff's sale thereof, the purchaser having received no notice of partition proceedings; and the principal case was distinguished on the ground that there the Fousts never recorded their deed, and abandoned the purchase, and the partition proceedings remained uncontested for thirty years.

ADVERSE POSSESSION MAY BE SHOWN AS DEFENSE TO PARTITION: *Portis Hill*, 65 Am. Dec. 99, note 109.

POWER OF PROBATE COURT TO DECREE PARTITION OF DECEDENT'S REALTY is not limited to any particular time or number of years after the estate is settled: *Earl v. Rowe*, 58 Am. Dec. 714.

DECREES OF PROBATE COURTS UPON MATTERS WITHIN JURISDICTION CANNOT BE COLLATERALLY IMPEACHED except for fraud: *Saltonstall v. Riley*, 65 Am. Dec. 334, and cases cited in the note 341; *Gilmore v. Rodgers*, 41 Pa. St. 127, citing the principal case. A decree of distribution by the orphans' court is conclusive upon all questions until reversed: *Bradshaw's Appeal*, 3 Grant Cas. 109, citing the principal case. If a decree of the orphans' court confirming a sale is invalid for want of prescribed security, it cannot be so declared in a collateral action of covenant for the arrears of the ground-rent sold, but only on appeal from the decree: *Dixey's Ex'rs v. Lansing*, 49 Pa. St. 146, citing the principal case.

INDEPENDENT MUTUAL INSURANCE CO. v. AGNEW.

[34 PENNSYLVANIA STATE, 96.]

VALUE OF GOODS LOST OR STOLEN, WHILE BEING REMOVED FROM BUILDING ACTUALLY ON FIRE, may be recovered in an action on a fire insurance policy containing a condition that the insured shall use his best endeavors for saving and preserving the property.

DEBT on a policy of insurance against fire upon a stock of merchandise in the store of the plaintiff, Agnew, in Philadelphia, and containing the condition: "In case of fire, or of loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and it is mutually understood that there can be no abandonment to the insurers of the subject insured." When the premises, which consisted of a four-story brick and iron store, were discovered to be on fire, the plaintiff, who occupied the first and second stories of the building, proceeded hastily to remove his goods, which consisted of a valuable and costly stock of dry goods. The stock was damaged by water and fire, and during the removal many of the goods were lost or stolen. The appraisers, under the agreement to refer, made an estimate of the plaintiff's damage by fire and an estimate for the goods lost or stolen. Upon the trial the defendants excepted to the

admission of evidence of the agreement on the part of the president of the company, that the appraisers should estimate the value of the goods lost or stolen; and of the report or award of the appraisers. The court instructed: "The policy is against losses by fire, and does not extend to losses by theft merely as such. But if it became and was necessary to throw open the doors of the building to admit firemen and other persons from the street, and to remove the goods in order to prevent their destruction by fire, and if, in consequence of the measures thus taken, some of the goods were lost or destroyed, although by theft, the insurers will be answerable for the loss, because it is a sacrifice for their benefit." The defendants excepted to this instruction, and verdict and judgment being for the plaintiff, assigned error.

Bullitt, for the plaintiffs in error.

Cuyler, for the defendant in error.

By Court, READ, J. The real question in this case is, whether goods stolen or lost at a fire are within a policy of insurance against fire. A fire policy has been held to cover losses by the removal of the goods from a building actually on fire, although the goods may not have been burned, but in fact were injured by water or by the breakage in the act of saving them from fire. Either goods insured are to be left in a building on fire to share its fate, or they are to be removed at the risk of the insurer, who stipulates that in case of fire or of loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property, and that there shall be no abandonment to the insurers of the subject insured.

The only method of saving goods in a burning store is by removal. If the insured were to lock up his store and refuse admission to the fire department, and his stock on hand was burned up, it is clear that he would have no claim under his policy, he having deliberately violated a fundamental condition of it. His only alternative, then, is to employ the usual means to remove his goods to a place of safety, and if he does so carefully, prudently, and in good faith, he certainly should not suffer losses necessarily attendant upon a removal at such a time without being indemnified by the party for whose benefit it was effected.

In a large city, the removal of valuable goods, such as silks,

ribbons, etc., in the night-time, from a store actually on fire, is attended with certain inevitable consequences, such as damage by water, or handling, or being lost or stolen. With all our efforts at organization, we have not yet been able so thoroughly to occupy a building and all its approaches by the police and the fire departments as to entirely exclude those common thieves who form a part of every crowd in a populous community. It is therefore one of the risks necessarily contemplated by the insurer when he requires the insured to use his best endeavors for saving and preserving the property, that in the process of so doing they may be lost or stolen by dishonest persons.

Goods thus taken or stolen are clearly within the spirit of the policy and its conditions, and the only question is, Do the decisions countenance such a construction of the instrument? —always recollecting that actual destruction by fire is not necessary to sustain a claim under it.

Upon the argument, *Case v. The Hartford Ins. Co.*, 13 Ill. 676, was cited, and is directly in point, as was the *dictum* of Napton, J., in *Webb v. Protection & A. Ins. Co.*, 14 Mo. 1. Since then the case of *Tilton v. Hamilton Fire Ins. Co.*, decided in June, 1857, by the superior court of the city of New York, has been published in 1 Bosw. 367, in which the whole subject was most elaborately discussed by the late Chief Justice Duer, and the present chief justice. The full court (Hoffman, J., dissenting) held that a loss by the stealing of goods at a fire, in a large and populous city, is recoverable as a loss occasioned by fire. We are disposed to adopt this construction of the policy, as supported not only by analogy, but by authority, and upon this point therefore the judge below was right.

This, in fact, disposes of the whole case, for the court, after the admission of the written agreement to refer, which really covered losses by theft, and the declaration of the appraisers, were clearly right in admitting in evidence the report made by them in pursuance of the agreement, under the first count in the declaration, although not evidence under the account stated: *Bates v. Townley*, 2 Exch. 155. The reduction made in their report from the actual deficiency was favorable to the plaintiff in error, and when connected with the preceding part of their finding, discloses no such error as obliges the court below to reject the instrument itself.

Judgment affirmed.

INSURER AGAINST FIRE IS NOT LIABLE WHEN NEITHER STOCK OF GOODS mentioned in the policy nor the house in which it was contained was touched by the fire, but the goods were damaged in their removal, under a reasonable apprehension that they would be reached by the flames, which had caught one of the houses in the same block: *Hillier v. Allegheny Co. etc. Ins. Co.*, 45 Am. Dec. 656, and note.

THE PRINCIPAL CASE IS CITED to the point that an action of debt is maintainable on an insurance policy: *Girard Fire Ins. Co. v. Field*, 3 Grant Cas. 332.

SMITH v. DERR'S ADMINISTRATORS.

[84 PENNSYLVANIA STATE, 126.]

CHILD BORN OUT OF WEDLOCK, AND LEGITIMATED UNDER LAW OF ANOTHER STATE, is not thereby clothed with inheritable capacity in Pennsylvania, where the fact of birth in wedlock alone gives the capacity to inherit.

DEBT by the administrators of Derr, deceased, to recover on a bond given by the defendant to the plaintiffs to secure the purchase-money of certain real estate of the decedent sold by the plaintiffs under an order of the orphans' court in partition proceedings. A case stated was agreed upon, which set forth that the decedent died intestate, leaving a widow, and brothers and sisters, and the children of deceased brothers and sisters, but no issue. Under the proceedings in partition, real estate of the decedent was sold to the defendant, and the amount sued for was the balance of the purchase-price remaining unpaid. A brother of the decedent, and a resident of Tennessee, died in the life-time of the decedent, leaving no issue born in lawful wedlock, but leaving an illegitimate daughter, Nancy, with whose mother the deceased brother had never intermarried; but in the life-time of the intestate the deceased brother petitioned for and obtained a decree of the circuit court of Giles county, Tennessee, where Nancy then did and still does reside, duly legitimating her. Nancy was not made a party to the proceedings in partition, nor was any notice thereof given her. If the court should be of the opinion that Nancy was an heir of the intestate, and that the omission of her name in the partition proceedings, and the failure to give her notice thereof rendered the title of the defendant defective, then it was agreed that judgment should be entered for the defendant, otherwise for the plaintiff. Judgment for the plaintiff, and error assigned by the defendant.

W. C. Johnston, for the plaintiff in error.

Paul Leidy, for the defendants in error.

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By Court, LOWRIE, C. J. This case is covered by the principle decided in *Doe v. Vardill*, 5 Barn. & Cress. 438, S. C., 6 Bing. N. C. 385, that a person born out of wedlock, and legitimated by the Scotch law, by the subsequent marriage of his parents, cannot inherit land in England. That case was so thoroughly and learnedly discussed in the king's bench, exchequer chamber, and house of lords, that we are saved from the labor which would be required if the question were new.

Nancy is an illegitimate niece of the intestate, born in Tennessee, and legitimated there on the petition of her father, by a proceeding in court. This forgives the vice of her birth in Tennessee, but not here. By our law, none can inherit but such as are "born in lawful wedlock," except that a bastard may be heir to his mother, and perhaps some other recent exceptions. The fact that inheritable capacity is granted by law elsewhere cannot change our law of descents. A capacity in Tennessee does not prove capacity here. So far as our law is concerned, legitimation by the subsequent marriage of the parents abroad by act of a foreign legislature, or by judicial decree abroad, are all fruitless. If they are allowed to constitute inheritable capacity here, then adoption might have the same effect. Then we should be without any law of inheritances in favor of relations in other states, except such as our neighbors should be pleased to give us. It is the fact of birth in wedlock that gives inheritable capacity, and not any artificial legitimation.

Judgment affirmed, and record remitted.

BASTARD CANNOT INHERIT AT COMMON LAW, NOR CAN HE TRANSMIT PROPERTY by descent, except to his own issue: *Norman v. Heist*, 40 Am. Dec. 493, note 495; *Porter's Heirs v. Porter*, Id. 55; *Sneed v. Ewing*, 22 Id. 41.

ADOPTION UNDER LAWS OF ANOTHER STATE.—In a well-reasoned opinion, Gray, C. J., has decided that the *status* of any person with the inherent capacity of succession or inheritance is to be ascertained by the law of the domicile which creates the *status*, at least when the *status* is one which may exist under the laws of the state in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the *status* and capacity acquired in the state of the domicile. Accordingly, a child adopted under and in conformity to the laws of the then state of domicile of the parties, which gave the child the same rights of inheritance in the estate of the adopting father that his legitimate offspring would have, is entitled, after the adopting father and adopted child have removed their domicile into another state, to inherit there the real estate of such father as against his collateral heirs; although his wife has given no formal consent to the adoption as required by the statutes of adoption of the latter state: *Ross v. Ross*, 129 Mass. 243, citing the principal case at pages 245, 261.

VAN DRESOR v. KING.

[34 PENNSYLVANIA STATE, 301.]

CASE AS WELL AS TRESPASS LIES AGAINST OFFICER FOR SELLING DEFENDANT'S PROPERTY under execution, in disregard of his claim to the benefit of the exemption law.

TRESPASS AND CASE BECOME CONCURRENT REMEDIES WHEN THEY APPROACH DIVIDING LINE so closely as to be scarcely distinguishable from each other, and where no evil is perceptible from adopting either as a remedy.

CASE by King against Van Dresor, a constable, for selling the plaintiff's goods under an execution, in disregard of his claim to have them appraised and set apart to him, pursuant to the provisions of the exemption statute of April 9, 1849. The only question involved was, whether the plaintiff could recover in this form of action. The defendant requested an instruction that the plaintiff's remedy, if any, was in trespass, and that case would not lie. This was refused, and the defendant assigned error.

J. C. Marshall, for the plaintiff in error.

W. A. Galbraith, for the defendant in error.

By Court, THOMPSON, J. In *Wilson v. Ellis*, 28 Pa. St. 238, afterwards recognized in *Freeman v. Smith*, 30 Id. 264, it was determined that trespass would lie against a sheriff or constable for neglecting or refusing to give the defendant in the writ the benefit of the three-hundred-dollar act, when it had been properly demanded. It was so ruled, upon the principle that the abuse of authority, under the writ, made the officer a trespasser *ab initio*, and placed him in the same situation as if the writ had been void; for he was not entitled to use it as a justification in consequence of his disregard of the requirements of the law in executing it. There are many authorities for this, not to be doubted or disputed. But it was not determined that case would not lie under such circumstances. Trespass and case assimilate as remedies often. And this is true when they approach the dividing line, as they often do, so closely as scarcely to be distinguishable from each other, and where no evil is perceptible from adopting either as a remedy. But this does not obliterate the distinction; for, as they recede from the point of assimilation, the distinction becomes manifest, and the form of action to be adopted obvious; such as trespass for a willful injury to property, and case for injury by neglect; or trespass for a battery, and case for slander, and the like.

There is no doubt but that trespass in cases like the present will lie, but it is sustained by the employment, to some extent, of a fiction; namely, the want of a writ to justify under, because the party has abused it. It is, however, obvious that the more natural and direct remedy would have been an action, founded on the breach of duty in refusing or neglecting to allow the debtors' demand of the provisions of the exemption law. For a neglect of duty, case is generally the remedy. In the execution of process, the law requires the officer to appraise, and allow the debtor to elect and retain property to the extent of three hundred dollars, if there has been a demand. This is a duty enjoined, a breach of which occasions the injury, and for such an injury occasioned in such a way no doubt case will lie, as for a breach of duty. The argument that because trespass may be sustained case cannot is sound to the extent only of those manifest indications which exist in force directly applied, and where it is not so, there the distinction is clear. The remedies are distinct, and must generally be followed. It is true, however, that case is a more extensive remedy than trespass, for it is often within the province of the party to waive the trespass and recover for the consequential injury. This has frequently been ruled in England. The cases of *Smith v. Goodwin*, 2 Nev. & M. 114, and *Branscomb v. Bridges*, 1 Barn. & Cress. 145, cited by the defendant in error, and 1 Ch. Pl. 139, clearly show this. So in New York, *McAllister v. Hammond*, 6 Cow. 842. In Pennsylvania there are many cases to show that the remedies are sometimes concurrent. In *Ream v. Rank*, 3 Serg. & B. 215, case for debauching plaintiff's daughter, Tilghman, C. J., said: "That to support trespass, a fiction is resorted to, viz, that the defendant committed an assault upon the woman: I will not say that such a fiction, resting upon long practice, may not be supported, because it is not material in what form the suit is brought, provided the cause be tried on its merits; but I may safely say that a different form, in which truth is told and fiction discarded, is not only maintainable, but most proper." And Duncan, J., said: "Force is implied when a daughter or servant has been enticed away or debauched, and trespass may be supported, though case for the consequence of the wrong appears to be the more proper form of proceeding." See also *Hoover v. Heim*, 7 Watts, 62. A recovery in either form of action would be a bar to an action for the same cause in any other form. As when the trespass is waived and *assumpsit* or trover is brought, either

would bar an action of trespass. So trover or replevin may be concurrent remedies, and one action would bar the other.

We are of opinion that case would lie for the injury complained of here, or that trespass would have lain; and as the learned judge of the common pleas ruled that the action was well brought, the judgment must be affirmed.

Judgment affirmed.

REMEDY OF DEBTOR WHOSE EXEMPTION RIGHTS HAVE BEEN DISREGARDED — RIGHT TO USE FORCE.—It has been held that where an officer attempts to levy on property exempt from execution, after being informed of the fact, he is a trespasser, and the owner may employ as much force as is necessary to prevent the levy; but he is liable if he uses more force than is necessary: *State v. Johnson*, 12 Ala. 840; S. C., 46 Am. Dec. 283. Of this decision, it is said, in *Freeman on Executions*, sec. 215: "We have the authority of one case for saying that the claimant may lawfully resist the officer who persists in seizing the property. We apprehend that this is a mistaken view. Its maintenance would make each claimant the judge of the merits of his own claim, and would lead to violence, and even to loss of life."

FORMS OF ACTION.—*Trespass, Case, Trover.*—At common law, an officer who disregards a debtor's exemption right properly perfected, and sells the property without allowing the debtor the benefits of the exemption statute, is a trespasser, and is liable to the debtor in an action of trespass: *Dow v. Smith*, 7 Vt. 465; S. C., 29 Am. Dec. 202; *Bonnel v. Dunn*, 28 N. J. L. 153; *Cornelia v. Ellis*, 11 Ill. 585; *Pace v. Vaughan*, 6 Id. 30; *Wymond v. Ambsbury*, 2 Col. 213; *Wilson v. Ellis*, 28 Pa. St. 239; *Freeman v. Smith*, 30 Id. 264; *Stephens v. Lawson*, 7 Blackf. 275; *Atkinson v. Gatcher*, 23 Ark. 101; *Hall v. Penney*, 11 Wend. 44; S. C., 25 Am. Dec. 601; see *Davis v. Bryan*, 7 Yerg. 88; *Hutchinson v. Campbell*, 25 Pa. St. 273; *Beam v. Hubbard*, 4 Cush. 85; *Cornack v. Hale*, 23 Wend. 466; *Perry v. Lewis*, 49 Miss. 443. In Vermont, it has been held that case will not lie, but that trespass is the proper form of action. The decision was based on usage, trespass having been the form always used in that state: *Dow v. Smith*, 7 Vt. 465; S. C., 29 Am. Dec. 202. The principal case sufficiently demonstrates on principle that trespass on the case will lie. In *Spencer v. Brighton*, 49 Ma. 326, the action was case; and in Mississippi, the statute makes the sheriff liable to an action either of trespass or case: *Perry v. Lewis*, 49 Miss. 443. In Tennessee, the action is brought in the form of trover: *McCoy v. Dail*, 6 Baxt. 137; *Pollard v. Thomason*, 5 Humph. 56; *Wolfenbarger v. Standiford*, 3 Sneed, 661. In *Williams v. Miller*, 16 Conn. 144, the action was trespass with a count in trover. In states where the common-law forms of action are not retained, the action will be an ordinary action for damages: *Spencer v. Long*, 39 Cal. 700; *Fuller v. Sparks*, 39 Tex. 136. In Pennsylvania, where the statute does not exempt specific property, but where, on demand, it is the duty of the officer to allow an exemption of a specified value, the debtor has no right to the proceeds of the sale, his sole remedy being an action against the officer for the trespass: *Marks's Appeal*, 34 Pa. St. 36; S. C., ante, p. 631; *Hammer v. Press*, 19 Id. 255; *Hatch v. Bartle*, 45 Id. 186; *Bonsall v. Conly*, 44 Id. 442.

Upon refusing to allow the debtor to select and have appraised to him, out of the property seized on execution, property to the amount exempted by the statute, the officer who makes the seizure becomes a trespasser *ab initio*: *Wil-*

son v. Ellis, 28 Pa. St. 238. To the contrary effect is *Bonnel v. Dunn*, 29 N. J. L. 435 (reversing S. C., 28 Id. 155), decided upon the authority of the *Sia Carpenters' Case*, 8 Co. 290, and other cases, and holding that the officer who makes the seizure lawfully cannot become a trespasser *ab initio* by mere non-feasance, such as refusing to allow a selection and appraisement as directed by the exemption statute, and will not be liable in trespass. Mr. Thompson, in his excellent work on homesteads and exemptions, sec. 875, says of this decision: "This conclusion will provoke a smile from lawyers trained to practice under the codes, and such law has ceased to be anything more than history, even in Westminster Hall." If trespass will not lie, certainly case will: *Id.* Let the practitioner under the ancient forms count in case as well as trespass. The solution adopted in the principal case is certainly to be applauded—that either trespass or case will lie. The matter rests within that field where serious doubt must always exist as to whether trespass or case be the proper form of action—a field where the old jurists, judges, and lawyers delighted to delve, but wherein in these practical times it is advisable not to enter. Let the courts decide that either trespass or case may be maintainable "where no injury can result to either party." With such questions as these, however, the practitioner under the codes has little to do.

If the defendant has not been allowed to exercise his statutory right to choose what he is entitled to have exempted, he may elect to take as exempt what has been sold under the execution, and may sue the levying officer for its value: *Stilson v. Gibbs*, 53 Mich. 280.

Replevin.—Upon the question whether replevin may be maintained against an officer who takes property by virtue of a writ, the cases are conflicting, some authorities holding that the property is in the custody of the law, and hence replevin will not lie either for a third person whose property has been taken as that of the judgment debtor, or for the judgment debtor whose exempt property has been taken: *Kellogg v. Churchill*, 9 Am. Dec. 104; *Gist v. Cole*, 10 Id. 616; *Smith v. Huntington*, 14 Id. 331; *Spring v. Bourland*, 54 Id. 243. Other authorities maintain that a third person, whose property has been levied on, may replevy it out of the hands of the officer who has taken it under a writ against another; but that this remedy does not lie in favor of an execution defendant whose exempt property has been levied on: *Dunkam v. Wyckoff*, 20 Id. 695; *Bruen v. Ogden*, Id. 593; *Allen v. Crary*, 25 Id. 566; *Phillips v. Harris*, 19 Id. 166; *Clark v. Skinner*, 11 Id. 302; *Dearmon v. Blackburn*, 60 Id. 160. The rule of the common law, that property levied on under execution is *in custodia legis*, and cannot therefore be replevied from the possession of the levying officer, has been much modified in many states by statutes and codes of procedure, which permit this remedy to a stranger to the writ whose property has been levied on, and in many states to the execution defendant also whose exempt property has been taken. And even in the absence of statutes of this kind, logic and law would permit this remedy to the debtor. There are many authorities, however, which deny him this right. This subject is discussed in the notes to *Dunkam v. Wyckoff*, 20 Am. Dec. 696-699; *Kellogg v. Churchill*, 9 Id. 105. That the debtor may maintain replevin, see the late cases: *Carlson v. Small*, 32 Minn. 492; *Frasier v. Syas*, 10 Neb. 115; S. C., 35 Am. Rep. 446; *Douch v. Rahner*, 61 Ind. 64; *Chapin v. Hoel*, 11 Ill. App. 309. In Mississippi, it is held that the debtor's statutory remedy is not exclusive, but that he may maintain replevin if he chooses: *Ross v. Hawthorne*, 55 Miss. 551. See *infra* for pleading and practice in replevin.

Statutory Penalty.—In some states the statute provides for the recovery by the debtor of double or treble the value of exempt property wrongfully sold on execution: *Shear v. Reynolds*, 90 Ill. 238; *Wymond v. Amsbury*, 2 Col. 213.

Criminal Prosecution.—In some states, an officer who refuses to allow a debtor his exemption rights is liable to criminal prosecution, and may be convicted and punished as for a misdemeanor: *State v. Carr*, 71 N. C. 106.

WHO MAY SUE.—The exemption of certain property from execution by force of a statute is a personal privilege: *Keybers v. McComber*, 6 West Coast Rep. 390 (Cal.); *Hammeremith v. Avery*, 1 Id. 662 (Nev.); which the owner alone can claim. His bailee or agent cannot maintain an action on this ground for property taken in execution against the owner: *Mickles v. Tousley*, 1 Cow. 114. Where an officer sues third persons in trespass for taking from him the property levied on, the defendants cannot set up in defense the fact that the property was exempt from execution in the hands of the defendant in the process under which it was seized: *Earl v. Camp*, 16 Wend. 571. So where a purchaser at execution sale sues one who unlawfully detains the goods purchased, it is no defense for the defendant that the goods were exempt in the hands of the defendant in execution: *Smith v. Hill*, 22 Barb. 659, 660. See also *Connaughton v. Sands*, 32 Wis. 387; *Main v. Bell*, 27 Id. 517.

Title Necessary.—Against mere wrong-doers a rightful possession is sufficient to enable one to maintain trespass: *Linard v. Crossland*, 60 Am. Dec. 213, and note. If the plaintiff proves that he was in possession claiming title, this is sufficient *prima facie* to enable him to maintain the action; and no one but the true owner, or one connecting himself with the true owner in some way, is at liberty to impeach his title. An officer, aside from the protection which the execution affords him, stands as a mere stranger and intruder. Accordingly, in an action against him for levying upon exempt property, he can urge neither a defect of title, nor an entire absence of title, in the plaintiff as a defense to the action: *Hoyt v. Van Alstyne*, 15 Barb. 572; *Duncan v. Spear*, 11 Wend. 54. In an action, however, under a statute permitting the recovery of a penalty of three times the value of the exempt property sold, the plaintiff must be the owner of the chattel sold, and the officer is not estopped by his return on the execution from denying the ownership of the plaintiff: *Cassell v. Williams*, 12 Ill. 387. The owner of exempt chattels attached in the hands of a bailee cannot maintain trover for them, unless the special property of the bailee be shown to be terminated: *Bourne v. Merritt*, 22 Vt. 429. Where the debtor sells property that has been levied upon in his hands, and for which he has given a delivery bond, and it is nevertheless again seized and sold under execution, the action for its recovery must be brought by the vendee, and not by the debtor himself: *Gregory v. Latchem*, 53 Ind. 453.

Receiver, Assignee.—The right of action of an insolvent debtor against an officer who has sold exempt property does not pass to his receiver in insolvency or assignee in bankruptcy, because the right of action is founded upon an injury to property that does not pass to the receiver or assignee. The action may be brought by the debtor himself: *Hudson v. Plets*, 11 Paige, 181; *Andrews v. Rowan*, 28 How. Pr. 126; *Williams v. Miller*, 16 Conn. 144. And a judgment recovered by the debtor in such an action will not pass to the receiver, though he was appointed after the recovery of the judgment: *Andrews v. Rowan*, *supra*.

AGAINST WHOM ACTION LIES.—The action is usually brought against the sheriff or officer who levies upon and sells the exempt chattels: See cases cited *supra*, "Trespass." The execution creditor is, however, equally liable with the sheriff, if he directs the levy or sale. He is a co-trespasser with the sheriff, and therefore suable, either jointly or severally, for the tort: *Elder v. Prescott*, 5 West Coast Rep. 52 (Nev.); *Atkinson v. Gatcher*, 23 Ark. 101;

Spencer v. Brighton, 49 Mo. 328; *Bonnel v. Dunn*, 29 N. J. L. 435. In *Fraser v. Syas*, 10 Neb. 115, S. C., 35 Am. Rep. 446, the action was replevin against the judgment creditor.

An execution sale of land exempt under the homestead laws passes no title whatever to the purchaser at the sale. And it seems this rule, with perhaps some restrictions, may apply also to execution sales of exempt chattels: See *Freeman on Executions*, sec. 215; *Thompson on Homesteads and Exemptions*, sec. 877. An execution sale of exempt chattels passes no title to the purchaser: *Williams v. Miller*, 16 Conn. 144. The purchaser of property exempt from execution, at an execution sale, is not liable in an action for its recovery, brought without demand by the owner, who, being present, failed to claim the exemption, but forbade the sale upon grounds having no foundation in fact: *Twinam v. Swart*, 4 Lans. 263. But an execution sale of exempt property, after notice that the owner claims it as exempt, passes no title to the purchaser; and the property may be recovered in replevin from the purchaser: *Johnson v. Babcock*, 8 Allen, 583; *contra, Bonsall v. Comly*, 44 Pa. St. 442.

NO ACTION AGAINST SHERIFF FOR SELLING HOMESTEAD PROPERTY.—No right of action for damages accrues against a sheriff who levies on and sells homestead property, for no damage results from such a sale, as the sheriff's deed conveys no title, and the purchaser acquires no right to the property sold: *Kendall v. Clark*, 10 Cal. 17; S. C., 70 Am. Dec. 691; see *Defeltz v. Pico*, 46 Cal. 292.

LIABILITIES OF SURETIES OF OFFICER.—The sheriff's bondsmen are liable for his trespass in seizing and selling property exempt from execution: *State v. Moore*, 19 Mo. 369; S. C., 61 Am. Dec. 563; *State v. Farmer*, 21 Mo. 160; *State v. Carroll*, 9 Mo. App. 275; *Commonwealth v. Stockton*, 5 B. Mon. 192. A suit upon the bond is properly brought in the name of the state: *State v. Moore*, 19 Mo. 369; S. C., 61 Am. Dec. 563.

IT IS NO DEFENSE TO ACTION AGAINST OFFICER that the debtor had other property exceeding three hundred dollars in value which he fraudulently withheld from the officer and refused to permit him to levy on. But this may be received in evidence in mitigation of damages, and if proved, the damages will be merely nominal. The benefits of the act are intended for the honest poor, not for the protection of fraudulent debtors: *Freeman v. Smith*, 30 Pa. St. 264.

BOND OF INDEMNITY WILL NOT SAVE OFFICER HARMLESS in disregarding the exemption act. Such a bond is void, and not binding upon the parties: *Freeman v. Smith*, 30 Pa. St. 264.

PLEADING AND PRACTICE—BURDEN OF PROOF.—The burden of proof is upon the person who claims an exemption to show that he belongs to the class of persons defined by the statute as entitled to exemptions, as that he is the head of a family, etc.: *Alabama Conference v. Vaughn*, 54 Ala. 443; *McMasters v. Aloop*, 85 Ill. 157; *Calhoun v. Knight*, 10 Cal. 393; *Brown v. Davis*, 9 Hun, 43; *Smith v. Slade*, 57 Barb. 640; *Dains v. Prosser*, 32 Id. 290; *Tuttle v. Buck*, 41 Id. 417; *Griffin v. Sutherland*, 14 Id. 456; *Carrick v. Myers*, Id. 9; *Van Sickler v. Jacobs*, 14 Johns. 434; *Bourne v. Merritt*, 22 Vt. 431; *Wolfenbarger v. Standifer*, 3 Sneed, 659; *Pollard v. Thomason*, 5 Humph. 56; *Prewitt v. Walker*, 7 J. J. Marsh. 332; *Wymond v. Amesbury*, 2 Col. 213. The debtor must show that the chattels seized were of the kind enumerated in the statute as exempt, that they were kept for the use of the family, etc.; or if the goods are of kinds not specifically designated in the statute, but such as the statute permitted him to select, then he must show that they did not exceed

the value limited by the statute. In fine, he must, as indeed must every one who relies upon a statute for his cause of action, bring himself clearly within the statute: *Wymond v. Amesbury*, *supra*. The law will not presume, in the absence of evidence, that the debtor did not retain sufficient property to make up the amount which he was entitled to hold as exempt: *Tuttle v. Buck*, 41 Barb. 417. In proving that the chattels were "necessary," it is not indispensable that the word "necessary" should appear in the evidence. It is sufficient if facts are proved which prove or tend to prove this necessity: *Smith v. Slade*, 57 Id. 640; *Griffin v. Sutherland*, 14 Id. 456.

AVERMENTS IN DECLARATION.—When the debtor sues the officer for levying upon and selling his exempt property, he must aver in his declaration that he is the head of a family in order to be permitted to prove it: *Pollard v. Thomason*, 5 Humph. 56; *Wolfenbarger v. Standifer*, 3 Sneed, 661. See *Previtt v. Walker*, 7 J. J. Marsh. 332, where a replication was bad for wanting a like averment. He need not aver that he was not possessed of other property designated in the statute as exempt: *Smith v. Slade*, 57 Barb. 640; *Wheeler v. Cropey*, 5 How. Pr. 288; *Wilcox v. Hawley*, 31 N. Y. 658; *Austin v. Swank*, 9 Ind. 109; *Amend v. Murphy*, 69 Ill. 337. In Tennessee, however, such averment is necessary: *Wolfenbarger v. Standifer*, 3 Sneed, 661. In Kentucky, a replication that the horse levied on was the plaintiff's only work-beast, "not previously levied on by execution," was held bad, since it showed that he had other work-animals at the time which may have been his property though previously levied on: *Faulkner v. Bradley*, 2 Dana, 141. If the debtor desires to avail himself of the provision of the statute exempting one hundred dollars of property from levy and sale, he must select and claim them, and in an action against the officer for levying upon and selling the same, the declaration will be fatally defective if it fails to show such selection and claim: *Figueira v. Pyatt*, 88 Ill. 402. In Indiana, an execution defendant may, on filing the proper schedule, select the property which shall be exempt at any time before or after levy prior to sale; to this end a substantial and not a literal compliance with the statute is necessary, and in pleading that he took the steps required by the statute, it is not necessary to exhibit the schedule: *State v. Read*, 94 Ind. 103. Great accuracy in describing the chattel levied on is apparently not required. For example, where the statute exempted "a farm-horse," a declaration that described the animal as a certain bay stud-horse was good: *Tipton v. Pickens*, 1 Swan, 25. And it was not erroneous to instruct the jury that they might infer without positive evidence that the horse seized was a "plow-horse:" *Matthews v. Redwine*, 25 Miss. 99.

DECLARATION IN REPLEVIN.—IN WHAT COURT TO BE BROUGHT.—In replevin for exempt property a complaint is sufficient which alleges generally the plaintiff's ownership without stating the particulars of his title, or the levy by the defendant, and the exemption of the property from seizure. The justification under process is a matter of defense. And the plaintiff may show in rebuttal that the property taken is exempt: *Carlson v. Small*, 32 Minn. 492. In an action to recover exempt property in justice's court, a replevin affidavit, which states in the statute language that the property in question was not taken from the plaintiff "by any process legally or properly issued against him, or if so taken, it was exempt from seizure on such process," is not invalid on account of the retention of the alternative clause, and substantially states that the property was exempt whether taken under lawful process or not: Id. The statute of Michigan provides that in an action of replevin "it shall be sufficient for the plaintiff in his declaration, whether the original taking was lawful or otherwise, to allege with requisite certainty of time,

place, and value that the defendant received the property to be delivered to the plaintiff when thereunto afterwards requested, and that the defendant, although requested so to do, has not delivered the same to the plaintiff, but hath unlawfully detained the same, to the damage of the plaintiff in such sum as he may specify." Under this statute it is held that when the plaintiff sues for the seizure of exempt property it is not necessary to aver that the property was exempt in order to let in testimony to this effect, but that it is sufficient to follow the statute: *Elliott v. Whitmore*, 5 Mich. 532.

An action of replevin by the debtor against the sheriff who has seized exempt property need not be brought in the justice's court, because from that court the execution issued; but if the amount involved gives the superior court jurisdiction, it may be brought in that court: *Ross v. Hawthorne*, 55 Miss. 551.

PLEADING AND PRACTICE UNDER STATUTES PERMITTING RECOVERY OF DOUBLE OR TREBLE DAMAGES.—In some states the statute provides for the recovery against the officer of two or three times the value of the exempt property seized. The double or treble value of the property thus permitted to be recovered is in the nature of a penalty, and the plaintiff must declare as for a penalty. In actions founded on statutes, the averments of the declaration must bring the case clearly within its provisions. Penal statutes, furthermore, must receive a strict construction, and when an action is brought upon such statutes as these, the plaintiff must show by his averments that the case comes within the provisions of the law, or the pleading will be subject to demurrer. Accordingly, in a suit to recover treble the value of property levied upon, which is claimed as exempt under the statute, in lieu of the enumerated articles, the plaintiff must aver that he did not have any or either of the articles made specifically exempt, or if he had a portion and not all, he must aver what articles he did not have. It is not sufficient to aver that he did not have the articles specifically exempt, specifying them. Such an averment is not sufficiently certain, for it does not negative the possession of any or either of such articles: *Figuera v. Pyatt*, 88 Ill. 402. And though the statute provides that the penalty may be recovered in an action of trespass, an ordinary declaration in trespass will be bad, since it does not notify the defendant that the penalty given by the statute is sought to be recovered: *Pace v. Vaughn*, 6 Id. 30.

Election of Remedies.—The debtor may waive the penalty, and recover in an ordinary action of trespass for the value of the property: *Id.*; *Amend v. Murphy*, 69 Ill. 337; *Cornelia v. Ellis*, 11 Id. 585. And if the plaintiff has in some of his counts claimed the penalty and in others merely the value of the property, he may elect at the trial whether to proceed for the penalty or for simple damages: *Amend v. Murphy*, 69 Id. 337.

Verdict.—The verdict, in actions under such statutes, may be either for single damages or for the penalty of double or treble damages. If the verdict be returned for single damages, the judgment may be entered for three times the amount returned: *Wymond v. Ambury*, 2 Col. 213. See also *Beekman v. Chalmers*, 1 Cow. 584; *Warren v. Doolittle*, 5 Id. 684; *Newcomb v. Butterfield*, 8 Johns. 342; *Cooper v. Maupin*, 6 Mo. 634; *Lowe v. Harrison*, 8 Id. 350; *Brewster v. Link*, 28 Id. 147; *Walker v. Warner*, 26 Id. 148. Where the declaration contains two counts, one under the statute and one at common law, and the verdict does not specify that the damages found were treble damages, it may be presumed that the verdict was for single damages, and the court may treble the damages: *Cooper v. Maupin*, 6 Mo. 634; *Brewster v. Link*, 28 Id. 147. But if the jury are instructed that they may return treble damages,

and they return a general verdict, the court will not treble the amount returned, since the court cannot know whether the verdict was upon the common-law or statutory counts: *Wymond v. Amesbury*, 2 Col. 217; *Brewster v. Link*, 28 Mo. 147. Where, however, the statute provides in terms that the damages may be treble or single, according to the circumstances of the case, the verdict must find the fact which will justify the court in trebling the damages: *Newcomb v. Butterfield*, 8 Johns. 342.

SET-OFF IN ACTIONS AGAINST JUDGMENT CREDITOR.—In an action against a judgment creditor for unlawfully seizing chattels of the debtor exempt from execution, the defendant cannot set up, as a counter-claim, the judgment under which the seizure was made: *Elder v. Frevert*, 5 West Coast Rep. 52 (Nev.); *Wilson v. McElroy*, 32 Pa. St. 82; Thompson on Homesteads and Exemptions, secs. 893, 894; *contra*, *Temple v. Scott*, 3 Minn. 419; but this case is hardly authoritative; see remarks of Mr. Thompson on Homesteads and Exemptions, sec. 803. In New York, a statute provides that "after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid." It was held under this statute that where the debtor sues another for seizing and selling his exempt chattel and obtains judgment, the judgment becomes a debt, which the defendant may pay to an officer who has in his hands another execution against the debtor: *Mallory v. Norton*, 21 Barb. 424.

In North Carolina the statute exempts personalty to a certain amount. A recovered a judgment against B. B subsequently obtained judgment for a less amount against A on a cause of action existing at the time of A's action, but which was not set up as a counter-claim. B moved in the court where both judgments were docketed to have his judgment against A credited against A's judgment against him. A set up that he did not own the amount of personal property exempted by the statute, exclusive of his judgment against B. And the motion was therefore denied, the court holding that it was "final process" within the meaning of the constitutional provision exempting a specified amount of personal property from final process: *Curies v. Thomas*, 74 N. C. 54.

EXEMPTION, WHETHER QUESTION OF LAW OR FACT.—Under statutes exempting such personal property as is necessary for food or for family use or for upholding life or necessary for a certain period of time, the question of necessity for such purposes, in an action for seizing and selling property claimed to be exempt on that ground, is a question of fact for the jury: *Atkinson v. Gatcher*, 23 Ark. 103; *Shaw v. Davis*, 55 Barb. 390; *Willson v. Davis*, 1 Denio, 462; *Van Sickler v. Jacobs*, 14 Johns. 434; *Dains v. Prosser*, 32 Barb. 291; *Patten v. Smith*, 4 Conn. 454. Whether a certain chattel is or is not "suited to his or her condition or occupation in life" is a question for the jury: *Cornelia v. Ellis*, 11 Ill. 584. Whether a fisherman's net and boat were "tools" within the meaning of the statute was held a question of fact for the jury, in *Sammis v. Smith*, 1 Thomp. & C. 444. Upon this case, Mr. Thompson remarks: "But the remitting of the interpretation of a statute to a jury is too clearly erroneous to need discussion. Whether the instruments in question were the means by which the debtor gained his livelihood was no doubt a question for the jury; and this is probably what the judge meant to say, for in the next sentence he proceeds to determine the question as a matter of law:" Thompson on Homesteads and Exemptions, sec. 885.

Though the question whether the article taken is a necessity or a luxury is often a question for the jury, yet in reference to such jewelry as a breast-pin, "the court may be understood to know so much of their nature and purposes as to be at liberty to determine, without the intervention of a jury, that under no circumstances can they be held to be requisite for the comfort and convenience of the wearers, so as to render them necessary within the meaning of the statute:" *Towns v. Pratt*, 33 N. H. 349, per Sawyer, J. In reference to an article of furniture and the like, this question properly goes to the jury to determine "its character and cost with a view to enable the court to decide whether 'necessary' or not:" *Dawlin v. Stone*, 4 Cush. 361, per Shaw, C. J.

EVIDENCE.—Value.—It is incumbent upon the debtor to show that the article alleged to be exempt does not exceed the value prescribed in the statute. A "team," within the meaning of the New York statute consists of one or two horses, together with their harness and the vehicle to which they are customarily attached for use. The statute exempts a team of the value of two hundred and fifty dollars. In an action by a debtor against an officer for levying upon his wagon, which he claimed was exempt as a part of his "team," he was obliged to show that the team collectively, wagon, horses, and harness, did not exceed in value the sum of two hundred and fifty dollars: *Dains v. Prosser*, 32 Barb. 290. Evidence of an offer made to the plaintiff for the property taken is inadmissible to show the value thereof: *Hammermith v. Avery*, 1 West Coast Rep. 662 (Nev.). The testimony of witnesses as to the amount they would give for the property is very inconclusive evidence of its value. A public sale at auction is more satisfactory, though not conclusive proof of the value of the article sold: *Waldo v. Gray*, 14 Ill. 184.

Official Character.—In trespass against an officer for selling exempt property, it is not necessary to prove the official character of the defendant, nor that of the officer who issued the writs under which the property was seized and sold: *Wymond v. Amesbury*, 2 Col. 213.

Declarations as Proof of Residence.—Where the levy was made when the debtor was absent from home, and the question arose whether or not he was a resident householder at the time of the levy, the declarations of the debtor at the time he left home, as to his intention in leaving, were admitted as a part of the *res gestæ*: *Austin v. Swank*, 9 Ind. 109.

MEASURE OF DAMAGES.—The debtor may recover the value of the exempt property seized: *Spencer v. Long*, 39 Cal. 700; *Wyckoff v. Wyllis*, 8 Mich. 48; *Stilson v. Gibbs*, 53 Id. 280. And in addition to the value of the property, he may recover the interest thereon from the date of the taking to the time of the assessment of damages: *Twinnam v. Swart*, 4 Lana. 263; *Spencer v. Brighton*, 49 Me. 326; Thompson on Homesteads and Exemptions, sec. 891. Where the plaintiff recovers the chattels themselves, the damages are ordinarily the interest upon the value of the property for a like period: *Twinnam v. Swart*, *supra*; Thompson on Homesteads and Exemptions, *supra*. But where the property consisted of a team of two horses and a wagon, it is held that the measure of damages for the detention was the value of the use of the team and wagon during the period of detention, rather than the interest during that period, for the latter would not afford proper compensation: *Blder v. Frevort*, 5 West Coast Rep. 52 (Nev.), citing *Allen v. Fox*, 51 N. Y. 562; *Williams v. Phelps*, 16 Mo. 80; *Crabtree v. Clapham*, 67 Me. 326. But see *Twinnam v. Swart*, 4 Lana. 263. It was error to instruct that in addition to actual damages for detention, the plaintiff might recover for the use of the horse: *Twinnam v. Swart*, *supra*.

Damages for the loss of business cannot be recovered when there is no testimony on the point: *McQuire v. Galligan*, 23 N. W. Rep. 479 (Mich.). The profits of a barber's business cannot be proved by evidence of the wages of journeymen barbers, for there is no necessary connection between the wages of journeymen and the profits of the principal: *Hammersmith v. Avery*, 1 West Coast Rep. 662 (Nev.).

Exemplary damages may be given in a proper case: *Knabb v. Drake*, 23 Pa. St. 480; S. C., 62 Am. Dec. 352; *Twinnan v. Scott*, 4 Lans. 263; *Stilson v. Gibbs*, 53 Mich. 280; but the elements of such damages should not be suggested to the jury in the charge of the court when they do not appear in the case: *Stilson v. Gibbs*, 53 Mich. 280.

WAIVER BY CONTRACT OF PROSPECTIVE EXEMPTION FROM EXECUTION: Note to *Bowman v. Smiley*, 72 Am. Dec. 741-745.

EAGAN v. CALL.

[84 PENNSYLVANIA STATE, 286.]

UNBOUNDNESS OF ARTICLE SOLD AMOUNTS NEITHER TO WANT FOR FAILURE OF CONSIDERATION. In the absence of warranty, the soundness or unsoundness of the subject-matter of the sale has nothing to do with the consideration.

THERE IS ORDINARILY NO IMPLIED WARRANTY OF SOUNDNESS IN SALES, but the purchaser takes his own risk as to quality.

RULE OF CIVIL LAW THAT SOUND PRICE IMPLIES WARRANTY THAT ARTICLE SOLD IS SOUND is not a rule of the common law.

WHERE BUYER HAS HAD OPPORTUNITY OF EXAMINING ARTICLE, THERE IS NO IMPLIED WARRANTY by the seller against latent defects unknown alike to himself and to the purchaser.

MERE INADEQUACY OF CONSIDERATION WITHOUT WARRANTY OR FRAUD IS NO DEFENSE to the payment of a bill or note given for the purchase-price of goods, and since the unsoundness of the article sold relates only to the adequacy of the consideration, this can furnish no defense.

ASSUMPSIT by Eagan against Call, the surety, and Grant, the maker of a single bill. The opinion states the case.

Sayers and Gopen, for the plaintiff in error.

Lindsey and Buchanan, for the defendant in error.

By Court, **STRONG, J.** The plaintiff sued upon a bill single given to secure the price of a mare sold by him to the defendants. Among other pleas, "want of consideration" for the bill was set up, and an attempt was made to establish it by proof that the mare was unsound at the time of sale. It was in reference to this defense that the learned judge of the court of common pleas instructed the jury that "to make a defense against the payment of the note, it was not necessary to establish the fact that Eagan (the plaintiff) knew the mare was

unsound. If unsoundness is made out, then the consideration of the note has failed, and on this equitable ground the defendant will be released from the payment of it." The instruction thus given is assigned for error. It is to be observed that it does not put the defense upon the ground of fraud in the contract, nor of express warranty by the vendor, but exclusively upon the bad quality of the thing sold. Now, that the unsoundness of the article sold amounts neither to want or failure of consideration is easily demonstrable. Want of consideration can only be where the promisee parts with nothing in exchange for the promise. The consideration fails when the promisor does not get that which the promisee agreed to give as a motive for the promise. But in the absence of warranty, the soundness or unsoundness of the subject-matter of the sale has nothing to do with the consideration. There is no relation of confidence between the buyer and the seller. In the absence of an agreement by the seller, the purchaser takes at his own risk as to quality. The vendor of a chattel warrants the title, and in some cases the species, but nothing more; consequently, when the title passes, the vendee has all that, under the contract of sale, the vendor engaged to give him, and therefore the entire consideration for his promise. There is then no failure. The rule of the civil law that a sound price implies a warranty that the article sold is sound is not a rule of the common law. I am not now speaking of cases of sale by sample, nor of cases in which the law is said to imply a warranty that the goods sold are the same in specie with those mentioned in the contract of sale. *Borrekins v. Bevan*, 3 Rawle, 37, is one of the latter. Though even these cases are, perhaps, rather adjudications of what shall be considered evidence of an express engagement, than extensions of the doctrine of implied warranty. There are also to be found decisions in which it has been held that the law implies in the case of a sale of goods by a manufacturer that they are of a merchantable quality; and other decisions ruling that where goods are sold for a particular use, there is an implied warranty that they are fit for that use. But it cannot be generally maintained that where the buyer has had an opportunity of examining the article, there is any engagement implied in the contract of sale that the seller warrants against latent defects unknown alike to himself and to the purchaser. Certainly there is no such engagement in the sale of such an article as a horse. The civil-law doctrine would produce endless embarrassments if applied to the

extended operations of modern trade. It always involves an inquiry into the question whether the price agreed to be paid was or was not a sound price, and, of course, leaves the measure of obligation of the contract to be determined by the jury. But if there be no such engagement by the vendor, then the buyer who has got an unsound or defective article cannot assert that he has failed to obtain all that for which he has contracted to pay. Mere inadequacy of consideration, without warranty or fraud, is no defense to the payment of a bill or note given for the purchase-money of goods, and the unsoundness or defective quality of the article sold relates only to the adequacy of the consideration.

There was error, therefore, in the instruction given to the jury by the court below. If the contract of sale was not fraudulent, if there was no deceit on the part of the plaintiff, to which knowledge by him of the defect was essential, and if there was no express warranty, the fact that the mare was unsound constituted no defense to the action.

It is unnecessary to notice the second and third assignments of error in detail; what we have already said is sufficient to express our views of them.

The judgment is reversed, and a *venire de novo* is awarded.

NO IMPLIED WARRANTY OF QUALITY WHERE ARTICLES ARE EQUALLY OPEN TO INSPECTION OF BOTH PARTIES: *Brantley v. Thomas*, 73 Am. Dec. 264. In the absence of fraud or warranty, *caveat emptor* is the rule of sales: *Brown v. Gray*, 72 Id. 563, and prior cases cited in the note 566. "There being no fraud alleged, it was necessary to show a warranty in order to defend on the ground that the timber was of bad quality:" *Heilbruner v. Wayne*, 51 Pa. St. 261, citing the principal case.

BANNON v. BRANDON.

[34 PENNSYLVANIA STATE, 263.]

WIDOW OF TENANT FOR LIFE, WHO CONTINUES IN POSSESSION without any contract between herself and the owner, holds in subordination to the owner's title, and not adversely. She is at least a tenant by sufferance.

ONE WHO MARRIES WIDOW OF TENANT FOR LIFE, WHO IS HOLDING OVER after the death of her husband, enters by virtue of her tenancy by sufferance, and not adversely; and his possession, not having commenced adversely, is presumed to have continued as it commenced, in privity with the owner. His possession is not made adverse by any mere intent he may have had.

ONE ENTERING, NOT ADVERSELY, BUT EXPRESSLY OR LEGALLY IN SUBSERVIENCE TO OWNER'S TITLE, cannot be permitted to treat his subsequent continued possession as adverse; but before the statute commences to run

in his favor, the privity between him and the owner must have been disowned and severed by some unequivocal act.

MERE INTENT TO HOLD ADVERSELY WILL NOT MAKE POSSESSION ADVERSE that was commenced in subservience to the owner's title.

ATTEMPT TO BETTER TITLE BY PROCURING TAX TITLE TO LAND cannot injure an inchoate right that one may have previously acquired under the statute of limitation. It does not render his possession less hostile.

EJECTMENT by Brandon against Bannon and others. The plaintiff, who was the alienee of Peoples, claimed title under the alleged adverse possession of Peoples. The defendants claimed under the heirs of Oliver Ormsby, who had a complete paper title to the premises. The land had been recovered from the plaintiff in an action of ejectment brought by the heirs of Oliver Ormsby. The case comes up on exceptions to instructions given and refused, and the opinion sufficiently states the case, with the exception of the third point upon which the defendants requested the court to charge, and which was as follows: "3. That if John Peoples did contrive or manage to have the land in dispute sold for taxes in 1822, and the same year procured a survey to be made of one hundred and thirty-five acres of it for himself, upon his alleged settlement and improvement, and at the same time changed his assessment from four hundred to one hundred and thirty acres, these acts of his, each and severally, are evidence going to show that prior to 1822 he had not been holding the land by an independent and adverse title, but in subordination to some superior or supposed paramount title, and that if such were the facts, the statute of limitations did not commence to run until that year, and had not secured to him a title prior to the commencement of the former action of ejectment." To which the court answered: "To the defendant's third point we answer: the land was sold for the taxes of 1817, assessed in 1816, in the fall or winter. The facts stated in this point are for the jury. His trying to get a good title by treasurer's deed would show a hostility at the time; whether before that or not, would throw very little light upon it. It is not inconsistent with an adverse claim for years, nor on the other hand, with a claim then but begun." To this instruction the defendants excepted.

S. P. Johnson, for the plaintiffs in error.

Church and Heydrich, for the defendant in error.

By Court, **STRONG, J.** Three errors have been assigned to the charge of the court of common pleas in this case; we shall

notice each, though not precisely in the order in which they have been assigned.

In the court below the plaintiff, now defendant in error, set up a title under the statute of limitations, alleged to have been acquired prior to the seventh of June, 1842. The contest was in regard to the point of time when the adverse possession commenced. From about the year 1801, until March, 1815, the land had been in the occupancy of James Bowles, who held it as the tenant of Oliver Ormsby, under whom the defendants below claimed. In 1815 Bowles died, leaving his widow in possession. There was some conflict of testimony whether the arrangement between Ormsby and Bowles was that the occupancy of the land should be enjoyed under the former during the life of Bowles alone, or during the life of Bowles and his wife, and the survivor of them. However that may have been, Mrs. Bowles continued in possession some time after the death of her husband, then put a tenant on under herself for a period, never surrendered the possession to Ormsby, but married John Peoples in 1817, and lived with him on the property until 1823, when she died. Peoples continued to occupy until 1828, when he sold to Brandon, who continued the occupation by himself, or tenants, until he was turned out by an ejectment at the suit of Ormsby's heirs, commenced on the seventh of June, 1842. The turning-point, therefore, of the case was in the question when, if ever, did Peoples's possession become adverse to the title of Ormsby. The defendant below requested the court to charge the jury "that if the tract was settled by James Bowles under Oliver Ormsby, and he remained on it till his death, and then his widow occupied by herself, or tenants, till she married John Peoples, and returned with him on to the land again, neither Peoples, nor any one claiming under him, can set up the statute of limitations as a bar to defeat the title of Oliver Ormsby, or his heirs." The court answered this point in the negative, and their answer is the second error assigned.

This point assumes that the lease from Ormsby ceased with the life of James Bowles, as was contended by the plaintiff below, and that the widow continued in possession without any express contract between herself and the owner. Its purpose was, therefore, to ask instruction as to what was the law on such a hypothesis of facts. Now, it is clear that after the death of Bowles, the widow's continuance in possession was in subordination to Ormsby's title, even though she had no personal contract with him securing its continuance. She had

entered by right under her husband, and when the right ceased, and she held over, she was at least a tenant by the sufferance. When Peoples married her and came upon the land, his entry, of course, was not tortious, for it was in right of his wife, and was, therefore, subordinate to Ormsby's title. His possession did not commence adversely, for having a right to enter in virtue of the tenancy at sufferance of his wife, the law presumes that he did so enter: *McMasters v. Bell*, 2 Penr. & W. 180; and his possession not having commenced adversely, it is presumed to have continued as it commenced, in privity with the owner. When the widow married, she was holding the possession for Ormsby, and her marriage did not change the character of her occupancy. Until her death, her possession, if continued, was virtually Ormsby's possession. It is abundantly established that where the entry has not been adverse, where he who sets up the statute of limitations came in expressly or legally in subservience to the title of the owner, he cannot be permitted to treat his subsequent continued possession as adverse. Before the statute commences to run in favor of such an occupant, the privity between him and the owner must have been disowned, severed by some unequivocal act. In cases of co-tenancy, the principle has often been laid down that before one co-tenant can avail himself of the statute against the other, he must have done some clear, positive, and unequivocal act of disloyalty, amounting to disseisin of the other owner. Mere declarations will not suffice; until such an act, his possession does not become adverse: *Phillips v. Gregg*, 10 Watts, 158 [36 Am. Dec. 158]; *Hart v. Gregg*, Id. 185 [36 Am. Dec. 166]; and *Watson v. Gregg*, Id. 289 [36 Am. Dec. 176]. The same rule has been applied in other cases than those of co-tenancy. Thus in *Cook v. Nichols*, 2 Watts & S. 27, it was applied to a case where a widow, having married again, continued with her second husband a possession for more than twenty-one years after the death of the first. The second husband was not allowed to stand on such a possession, to defeat a recovery by the heirs of the first. And this, because he was held to have come in under them, and not against their title. So in *Hall v. Mathias*, 4 Id. 331, it was again held that the entry of a widow upon the land of her deceased husband, claiming it as her own, and her continuing the possession thus taken for nearly thirty years, was no disseisin of the heirs; that to make it such there must have been some plain, decisive, unequivocal act or conduct on the part of the widow,

amounting to an adverse and wrongful possession and disseisin of the heirs.

In *Long v. Mast*, 11 Pa. St. 189, the same rule was applied to the case of a tenant by the sufferance, who had held over for more than twenty-one years. In *Zeller v. Eckert*, 4 How. 289, a case under the Pennsylvania statute of limitations, the rule was signally vindicated. There the widow was, by the will of her deceased husband, authorized to continue the possession of the land eleven years after his death. She married again within about nine months, resided upon the property about one year, and then left the possession; but her second husband and those claiming under him occupied it for thirty-five years, some twenty-five years after the right of entry of the owner accrued. It was held that the possession of the second husband was in privity with the estate of the owners, even when not children of the first husband, and that nothing short of an open and explicit disavowal of a holding under that title, and assertion of title in himself brought home to the owners, would make his possession adverse. Short of this, he was still to be regarded as holding in subserviency to the rightful title. Mr. Justice Nelson, in delivering the opinion of the court, remarked: "There are authorities maintaining the doctrine that a party standing in the relation of Eckert (the son of the second husband) to the title in question, is incapable in law of imparting an adverse character to his possession, and that, in order to deny or dispute the title, he must first surrender the possession and place the owner in the condition in which he stood before the possession was taken from him." While admitting that the law has been settled otherwise, he adds: "As the title was originally taken and held in subserviency to the title of the real owner, a clear, positive, and a continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute." "The statute, therefore, does not begin to operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful, by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner." See also *Yoder v. Yoder*, 18 Pa. St. 471.

In the light of these principles, how could the entry and possession of Peoples be a disseisin of Ormsby during the life

of Mrs. Bowles? And if not during her life, then only nineteen years of possession could be adverse before the ejectment was brought in 1842, the ejectment which dispossessed the grantee of Peoples. Until the death of People's wife, Ormsby was in possession through her; she did no act, she made no declaration disavowing his title, and it is difficult to see how Peoples, her husband, could, without putting his own wife out of possession, while she acknowledged Ormsby's title. Had the occupancy been surrendered to Ormsby, and had Peoples subsequently gone on and continued to hold adversely, doubtless the statute would have run, but only from the time of such subsequent entry. But there was no evidence of such a surrender. At all events, the second point of the defendants below assumed, and, as we think, the evidence warranted the assumption, that there had been no such surrender, or anything equivalent to it, and asked what would be the law in its absence. In our opinion, the point should have been answered in the affirmative.

The learned judge was of opinion that there were facts in evidence that justified his refusal to affirm the proposition. We do not think so. One of the witnesses testified that Bowles told him he had a right for life, and not his wife. That is wholly immaterial to this question, for if the fact were so, Mrs. Bowles was still a tenant at sufferance after her husband's death, and the point propounded assumes no more. Another witness testified that Ormsby told him to put Gordon (Mrs. Bowles's tenant) off, if he could get him off, and that he did get him off in 1817, but at the same time, Ormsby refused himself to bring a suit against Gordon. The testimony of this witness shows that Gordon was put off by the neighbors, because he was troublesome to them, not in order to terminate Mrs. Bowles's tenancy at sufferance, nor to restore Ormsby's actual possession. The same witness testified that Ormsby sent a line to Peoples in 1820 or 1821; that it was his impression Ormsby went to see Peoples, and that he wanted him to leave the place. All this is utterly insufficient to warrant a jury in finding that the privity between Ormsby and Mrs. Bowles had ceased. The assumption, therefore, of the defendants in their second point was a justifiable one, and the law in regard to it should have been delivered to the jury as requested.

This view of the case also evidences that the plaintiff below was not entitled to an unqualified affirmative of his first proposition. That proposition was, that "whether the entry of

John Peoples upon the land in controversy, in 1817, and his subsequent possession thereof, was adverse, is a question of intention, and as such, is to be determined by the jury from his contemporaneous acts and declarations."

If Mrs. Bowles was a tenant at sufferance, in privity with Ormsby's title, and continued so until her death, in 1823, John Peoples, having married her in 1817, and gone upon the land, could not make his possession adverse by any mere intent which he may then have had.

We see no error in the court's refusing to answer the defendant's third point as requested. Peoples's attempt to better his title in 1822, or to obtain another, could not injure an inchoate right which he may have previously acquired under the statute of limitations. It certainly was not an acknowledgment of Ormsby's title. In *Owens v. Myers*, 20 Pa. St. 134 [57 Am. Dec. 693], it was ruled that the purchase of an outstanding claim by one in possession does not render his adverse possession less hostile to the true title, nor divest his title already complete under the statute of limitations.

The judgment is reversed, and a *venire de novo* awarded.

ONE ENTERING IN SUBSERVIENCE TO OWNER'S TITLE CANNOT TREAT HIS POSSESSION AS ADVERSE until the privity between himself and the owner has been severed by some unequivocal act: *Williams v. Cash*, 73 Am. Dec. 739 (vendor and vendee), and note 741; *Martin v. Jackson*, 67 Id. 489; *Stamper v. Griffin*, 65 Id. 628; *Armstrong v. Risteen*, 59 Id. 115; *Arnold v. Stevens*, 38 Id. 305.

TENANT HOLDING OVER AFTER EXPIRATION OF TERM IS TENANT BY SUFFERANCE, and holds by title of original landlord until notice to quit or until a disclaimer of tenancy on his part: *Whaley v. Whaley*, 40 Am. Dec. 594.

THE PRINCIPAL CASE WAS AFFIRMED in *Brandon v. Bannon*, 38 Pa. St. 62.

COMMONWEALTH v. REED.

[34 PENNSYLVANIA STATE, 275.]

WORKS OF INTERNAL IMPROVEMENT ERECTED BY STATE FOR BENEFIT OF CITIZENS AT LARGE cannot be regarded as a public nuisance because they render the neighborhood unhealthy by obstructing running water and overflowing adjacent lands; and their character is not changed by placing them in the hands of a private corporation, with a requirement that they be kept up for the purposes for which they were constructed. The corporation occupies the same position as the commonwealth, and is no more indictable for a public nuisance than the commonwealth would be.

INDICTMENT against Reed and others, the president and directors of the Erie Canal Company, for maintaining a public

nuisance. A general demurrer to the defendants' plea was overruled, and the commonwealth thereupon assigned error. The opinion states the case.

H. C. Johnson, district attorney, and Farrelly, for the commonwealth.

Finney and Douglass, for the defendants in error.

By Court, READ, J. The president and directors of the Erie Canal Company are indicted for a public nuisance for keeping up and maintaining, by damming the southern end of the Pymatuning swamp, a certain pond and reservoir as a part of their canal, by means of which seven hundred acres of land are overflowed, and the waters in said pond and reservoir have become stagnant, putrid, and noxious, whence unwholesome damps and smells arise, and the air is greatly corrupted and infected, to the great damage and nuisance of the citizens of the commonwealth. There is also an allegation that the pond and reservoir are not necessary for the purposes of the canal, and ought to be dispensed with, as useless and injurious. To this indictment the defendants have pleaded specially that the pond and reservoir are a part of the internal improvements of the commonwealth, called the Erie division of the Pennsylvania canal, which was constructed by the commonwealth for a public highway, and that the alleged nuisance was created, constructed, and erected by the authority and in pursuance of laws of the general assembly of this commonwealth, by the officers, engineers, and agents thereof, lawfully created, appointed, and employed therefor, for the purpose of securing and furnishing sufficient water for the supply of the said Erie division of the Pennsylvania canal, and that the said defendants are in possession of the said pond and reservoir, in pursuance of the act authorizing the governor to incorporate the Erie Canal Company as directors of said company; and by the terms of the act of incorporation they are obliged to keep up the alleged nuisance for the purposes of the canal, in order that it may remain a public highway, and for the protection of the property reserved by the commonwealth. To this plea there is a general demurrer.

This indictment, it will be perceived, is not against the corporation, but against its officers; but no difficulty has been made on this point by the defendants, and the question has been argued upon the broad ground whether, upon the facts

declared in the pleadings, this is a public nuisance. The indictment shows that the works complained of were connected with the Erie canal, and the plea shows that they were constructed by the commonwealth, as a necessary part of the Erie division of the Pennsylvania canal, and are held by the Erie Canal Company as the grantees of the state, and are to be kept up by them, in order that the canal may remain a public highway.

We should suppose that works of internal improvement, erected at the expense and by the officers of the state, for the benefit of the citizens at large, never could be regarded by the law as a nuisance; for the sovereign authority has expressly intended them to advance the prosperity of the community. If this be so, how is it possible that their character should be entirely altered by being placed in the hands of a private company, with an express requirement that they should be kept up for the purposes of the canal, in order that it may be and remain a public highway? The commonwealth and its agents could not have been indicted, and it seems clear that the company and its officers occupy precisely the same position.

It would, indeed, be strange that any legal proceeding could be instituted in a county through which a great public work passes, by which the whole purposes of the improvement might be destroyed, upon the singular allegation that what has been constructed under the express authority of the legislature is a great public nuisance.

It will be observed, that it is not alleged that there is any damage to property (that, no doubt, has been paid for by the commonwealth), but that it is injurious to the health of the inhabitants residing there. It appears by the indictment that it was originally a swamp, but whether healthy or otherwise is not stated.

Now, the general charge would have applied equally well to any canal or slack-water navigation in the state, whether built by the state or private companies; to the whole line of the Pennsylvania canal, whether on the Juniata or the branches of the Susquehanna, or west of the mountains, or on the Delaware; to the Schuylkill navigation, and to a host of smaller works. Every dam under the act of 1803, and every common mill-dam, would be open to the attacks of the public prosecutor. The inevitable consequence of changing the course and current of rivers and streams by dams and obstructions is to occasion a kind of malaria in the first instance, which disap-

appears generally in a few years. The same effect is produced in the outskirts of our cities by the opening up of the fresh earth in the progress of improvements, until the district is graded, paved, and properly drained.

Upon the principle of this indictment, the rice plantations of Georgia and Lombardy should be abated.

The judgment is affirmed.

PUBLIC WORK CONSTRUCTED AND OWNED BY STATE cannot become a nuisance in the hands of the lessees from causes due to its construction: *State v. George*, 34 Ohio St. 668, citing the principal case. A corporation that has purchased from the state a public work may be indicted for so maintaining the works as to create *ab extra* a nuisance. That does not involve the construction, but the use; and therefore a corporation that purchased a canal from the state were indictable where water escaped through the bank of the tow-path, and formed stagnant pools on the land of adjoining owners. The principal case is thus distinguished in *Delaware Division Canal Co. v. Commonwealth*, 60 Pa. St. 373.

FULTON v. HOOD.

[34 PENNSYLVANIA STATE, 365.]

EXPERT TESTIMONY IS ADMISSIBLE AS CORROBORATIVE OF DIRECT TESTIMONY to prove that the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time.

ONE WHO SEEKS RELEASE FROM OBLIGATION OF HIS BOND ON GROUND OF ACTUAL FRAUD or misrepresentation must establish that there was a false representation of a matter of substance, important to his interests, and actually misleading him to his hurt. A false affirmation of a matter resting in opinion, or even of a fact equally open to the knowledge or inquiry of both parties, is not available for any such purpose.

BOND OF FATHER GIVEN FOR DEBTS OF SONS IS NOT INVALIDATED BY FALSE REPRESENTATIONS of obligee that he had authority to settle the claims of the other creditors of the sons, and that unless the bond was executed, those creditors would indict the sons for obtaining goods under false pretenses and send them to the penitentiary. Such evidence is therefore not admissible in an action on the bond.

DURESS AND UNDUE INFLUENCE AS DEFENSE TO BOND EXECUTED BY FATHER FOR DEBTS OF SONS is not made out by proof that the obligee falsely represented to the father that unless the bond was executed the creditors would indict the sons for obtaining goods under false pretenses and send them to the penitentiary, and that the father was nearly sixty-six years old, and had a mind easily influenced and excited. Such evidence is therefore inadmissible in an action on the bond.

DURESS PER MINAS IS NOT MADE OUT BY PROOF OF THREATS of legal prosecution of defendant's sons.

FAILURE OF CONSIDERATION OR FRAUD AS DEFENSE TO BOND IS NOT MADE OUT by evidence that it was given by a father for the debts of his sons, and that no time for the payment of the debts was given upon the exe-

ention of the bond, which itself recited that time had been given. Such evidence is therefore inadmissible in an action on the bond.

PAROL EVIDENCE CANNOT BE ADMITTED TO ADD TO CONDITIONS OF BOND or to contradict its provisions, and in action on a bond it is not permissible to prove that it was stipulated at the execution of the bond that notes given for the same debt should be surrendered in a few days, and that the notes had not been surrendered, but on the contrary three of them had been put in suit. Such an agreement might be a defense to the suits on the notes, but not to the suit on the bond.

PAROL EVIDENCE IS NOT ADMISSIBLE IN BEHALF OF OBLIGOR of bond and warrant of attorney to prove an agreement made at the time of its execution that judgment should not be entered up for a certain period except upon a specified contingency, for this would contradict the terms of the warrant of attorney. Otherwise, however, in favor of a junior execution creditor, for as between judgment creditors there is no contract in writing to be varied by parol.

OBTAINING PAPER FOR ONE PURPOSE AND USING IT FOR DIFFERENT AND UNFAIR PURPOSE is fraudulent, and the subsequent abuse will open the door for the admission of parol evidence of what took place at the execution of the instrument; but until the abuse or perversion of the instrument is shown, no fraud appears sufficient to make way for the admission of parol evidence to affect it.

JUDGMENT entered on bond and warrant of attorney in favor of Hood & Co., and executed by Robert Fulton, sen., in the sum of twenty thousand dollars. Some three years afterwards, upon the application of the defendant, Fulton, the judgment was opened and he was let into a defense. The firm of A. Fulton & Brothers, composed of the sons of the defendant, became insolvent, being indebted in large amounts to the plaintiffs and to other Philadelphia merchants. James Benbright, a member of the firm of Hood & Co., the plaintiffs, on the tenth of July, 1854, called with his attorney on the defendant and obtained the bond in question which covered the debts owing by A. Fulton & Brothers to all their Philadelphia creditors. The bond recites that, whereas, A. Fulton & Brothers are indebted to Hood & Co., and to other named creditors in a named sum, for which they have given their promissory notes payable in tri-annual payments for three years, "now the condition of this obligation is, that in consideration of the time given by said creditors to Alexander Fulton & Brothers on said account, if said Fulton & Brothers should fail to pay the said notes as they fall due, and the said Robert Fulton, sen., shall and does pay the amount of the same with interest and costs in ten years from this date, then this obligation to be void, also in full force and virtue. And further, I do hereby empower any attorney of any court of record in Pennsylvania

to appear for me, and after filing a declaration, to confess judgment against me for the above penalty and full costs of suit, release of all errors, and stay of execution for ten years from this eleventh day of May, 1854. (Signed) Robert Fulton, sen. Witness, Alexander McKinney." On the trial the defendant objected to the admission of the bond, on the ground that the date had been changed from the tenth of July, 1854, to the eleventh of May, 1854, and that the concluding words, "from this eleventh day of May, 1854," had been inserted after its execution and delivery. Thereupon Alexander McKinney, who had prepared the bond and was the subscribing witness, was called by the plaintiff and testified that the change of date and addition of the concluding words were made before the execution of the bond. The defendant having given evidence to the contrary, the plaintiff offered, in corroboration of McKinney's testimony, to prove by experts that in their opinion the whole of the bond, including the additional date, was written by the same hand, with the same pen and ink, and at the same time. The defendant objected to this evidence, and his objection was overruled. The defendant then offered in various forms to prove the false representations alleged to have been made by Bonbright at the time of the execution of the bond. The bills of exception are sufficiently stated in the opinion. Verdict and judgment for the plaintiffs, and writ of error sued out by the defendant.

Foster, Cook, Clarke, and Markle, for the plaintiff in error.

Cowan, for the defendants in error.

By Court, STRONG, J. Twenty-one errors have been assigned to this record. Many of them, however, are but repetitions of others, clothed in a dress slightly different, but having the same body. Under the plea of *non est factum*, the defendant introduced evidence to show that an alteration had been made in the date of the bond after its execution and delivery. The instrument was twice dated; once at the end of the penal part, and again at the close of the warrant to enter judgment thereon. The scrivener who wrote it testified positively that no alteration was made after its signature. On the other hand, the sons of the defendant, on account of whose indebtedness the bond was given, testified that when it was signed by their father the date was the tenth of July, 1854, instead of the eleventh of May, 1854, and that it was but once dated.

The allegation of the defendant, therefore, was that the last line of the instrument had been added, after its execution and delivery, and after it had been taken away by the agent of the plaintiffs. To meet this allegation, the plaintiffs were allowed to call experts, and prove by them that in their opinion the whole instrument, including the last line, was written by the same hand, with the same pen and ink, and at the same time. This evidence was objected to by the defendant, and its admission constitutes the subject of the last nine assignments of error. That it was relevant and material cannot be doubted, for it is obvious that if the last line of the bond, which contained the date, was written at the same time with the other parts of the instrument, the testimony of the scrivener was completely sustained, and the defense failed. Nor was it contended in the court below that the witnesses were not experts, but the objection as urged here is that the subject-matter of their testimony was not competent, that the facts testified to by them could not be legitimately thus proved. It is to be observed that the evidence was offered only after direct testimony had been given to prove that the bond was genuine, and that it was in the same condition as when signed by the defendant. It was admitted, not as independent, but as corroborative evidence. The case does not require a discussion of the extent to which courts of law have permitted experts to express opinions in regard to handwriting. The rule upon this subject is not the same in different courts, and even in the same court the decisions have not been uniform. It appears to be generally conceded that, where other writings admitted or proved to be genuine are already in the case, a jury may compare the handwriting. In such comparison, Greenleaf asserts the doctrine to be, that they may be aided by experts: 1 Greenl. Ev., sec. 578. Experts are also allowed to testify whether the handwriting be natural or feigned. So, too, it has been ruled that when one writing crosses another, an expert may testify which, in his opinion, was first written: 4 Moo. P. C. 433. I am aware that it has been said that though such opinions are admissible, not much reliance is to be placed upon them. Doubtless it is for the jury to determine how much. But why is not the testimony of the same nature with that which is generally adduced to prove handwriting? The witness who has seen another write but once may testify to his belief, and that belief is but a deduction which he makes from a comparison with the exemplar in his mind. Why should

that exemplar be regarded as more reliable than one presented to the expert's eye? In the present case, the greater part of the bond was proved to be in the handwriting of McKinney, the scrivener, and he had sworn that the whole was written at the same time. In corroboration of his testimony, we see no reason why experts should not have been permitted to testify that the writing itself indicated what the positive testimony of the scrivener declared.

The remaining errors assigned relate to the rejection of evidence offered by the defendant to sustain his equitable plea of payment with leave, etc. The first, second, third, and eighth present the same question. The court overruled the offer of the defendant to prove that, before and at the time when the bond was written, James Bonbright, one of the plaintiffs, represented that he had authority to settle the claims of the Philadelphia creditors, and that, unless the bond was executed, they would indict the sons of the defendant for obtaining goods under false pretenses, and send them to the penitentiary; that they had determined to do so; and that these representations were untrue. It is not easy to see how this, if proved, would have been at all material. The alleged representations were not assertions of existing facts, but, at most, of intentions in their nature almost incapable of proof or of disproof, and in no particular affecting the consideration of the bond. That they may have presented a motive inducing the father to secure the debts due from his sons is possible. But a party who seeks release from the obligation of his bond, on the ground of actual fraud or misrepresentation, must establish that there was a false representation of a matter of substance, important to his interests, and actually misleading him, to his hurt. A false affirmation of a matter resting in opinion, or even of a fact equally open to the knowledge or inquiry of both parties, is not available for any such purpose. Here the parties dealt upon equal terms. There was no relationship of confidence between them. Bonbright was a creditor seeking to obtain security for a debt due from the defendant's sons. Those sons were at hand when the alleged statements were made. Neither in a court of law, nor of equity, would it be presumed that any reliance was placed upon them. Nor were they statements of any matter relative to the interests of the defendant, or affecting him personally. Even if no such intention of the creditors existed, his situation is made no worse. It would do him no good, if all was true that Bonbright repre-

sented. No authority will be found for the position, that an immaterial representation, even though false, made by the obligee of a bond, will avoid the contract, either at law or in equity. The case of *Bowen v. Buck*, 28 Vt. 308, relied upon by the plaintiff in error, is far from establishing such a doctrine. There the agent of the creditor represented that a criminal prosecution had been commenced against the debtor; that a requisition had been obtained from the governor of New York, upon the governor of Vermont, for his arrest and extradition, and that he, the agent, then had the papers necessary for that purpose, but agreed that if the note upon which suit was brought should be executed, the prosecution should be stayed and discharged. In fact, these representations were false, and it was held by the supreme court of Vermont that there could be no recovery upon the note thus obtained, mainly because it was obtained in composition of a prosecution for a misdemeanor. But in that case the representation was personal and material to the promisor. In the present case, the statements of Bonbright had no reference to the obligor, nor was there any assertion that a prosecution had been already commenced, or any engagement to withdraw it, if the bond were given. In the Vermont case the agreement to withdraw the prosecution was a part of the consideration of the note. Here, it embraced no part of the consideration of the bond. There was, therefore, no damage to the obligor, without which there is no relief, even in equity.

The defendant having failed in obtaining the admission of the evidence thus offered to establish fraud and misrepresentation, next offered it to show duress and undue influence. Coupled with it was the additional fact that the defendant was nearly sixty-six years old; that he had a mind easily influenced and excited; and that he was unduly influenced and excited by the threats and misrepresentations of Bonbright. There was no proposal to show that he was under any physical or mental constraint, or that his mind was not perfectly free to assent to or dissent from the contract. What was meant by the expression "unduly influenced" was left entirely undefined. The duress proposed to be shown was duress *per minas*, and that, not of threats made against the defendant, or his property; nor were they threats of any illegal act, but of a resort to a court of law. Nothing more than this statement is necessary to vindicate the action of the court below in rejecting the evidence.

The tenth and thirteenth assignments of error have reference to the consideration of the bond. The defendant offered evidence to show that the debts secured by it were those of A. Fulton & Brothers, and not the debts of Robert Fulton, the obligor; and that no time was given for their payment when the bond was executed. Assuming all this to be true, no attempt has been made to show us how it affected the defendant's liability. Beyond question, he could assume a binding obligation to pay the debts of his sons, and the bond itself recited that time had been given to them. If there was a false statement respecting the forbearance, it was the obligor's own statement. No offer was made to prove that, at the time when the instrument was executed, there was any agreement that time should be given to pay the notes of the sons, and that the agreement had been violated. The bond asserts no such contract. It recites the notes, payable in triennial payments, and binds the obligor to pay in ten years, in consideration of the time given, if the sons should make default. The evidence offered, therefore, neither tended to show want or failure of consideration, much less fraud, for which also it was offered.

Another question is raised by the rejection of the defendant's offer to prove that previous to the execution of the bond, and at the time of the delivery, Robert Fulton had given his indorsed notes to the plaintiffs for their claim against his sons, amounting to about eight thousand dollars; that when the bond was given for this claim, and the others included in it, Bonbright stipulated to surrender the indorsed notes in a few days, assuring the defendant that if he failed to do so, the bond should be of no force; and that the notes had not been surrendered, but that on the contrary, three of them had been put in suit. If such an arrangement was made, possibly it would constitute a defense to the suits brought upon the notes, but to allow it to be proved on the trial of this issue would be to admit parol evidence to introduce another condition into the bond—to add to its expressed stipulations. It would be more: it would be, in effect, to allow its provisions to be contradicted by oral testimony. The bond binds the obligor to pay the notes on default of his sons. It, in effect, declares that they are to be retained by the creditors until paid. To give them up would discharge the bond. May a mortgagor prove by parol that when he executed the mortgage there was an engagement by the mortgagee to surrender the bond secured by it, immediately after its execution? Surely not; and yet this was

what was attempted in the present case. Written instruments are intended to furnish the evidence of contracts—they are worthless if they can be affected by such evidence as was here submitted.

Nearly allied to this was the offer to prove by parol that the bond was not to be "entered up" for ten years, unless upon a specified contingency; and that if judgment should be entered upon it, in violation of this arrangement, it was to be null and void; and that the bond was entered up notwithstanding the stipulation. This was in direct conflict with the terms of the warrant of attorney. It is true that in *Ayers's Appeal*, 28 Pa. St. 179, effect was given to such a parol agreement, in favor of a junior execution creditor, not, however, in favor of the debtor. As between two judgment creditors, the reason of the rule which excludes parol evidence to vary, add to, or contradict written contracts, does not exist. Between them there is no contract in writing; but as between the obligor and obligee, the warrant of attorney is expressed authority to enter judgment immediately. A contemporaneous parol agreement not to enter judgment for ten years is no less a contradiction of it than would be an agreement to strike out the warrant entirely. It is argued, however, that under the doctrine of *Renshaw v. Gans*, 7 Pa. St. 117, and *Rearich v. Swinehart*, 11 Id. 233 [51 Am. Dec. 540], the parol evidence was admissible. The principle of those cases is, that obtaining a paper for one purpose, and subsequently using it for a different and unfair purpose, is fraudulent; and that the subsequent abuse will open the door for the admission of parol evidence of what took place at the execution of the instrument. But if the principle reaches so far as is contended by the plaintiff in error, the rule which excludes parol evidence, when offered to alter, add to, or contradict a written instrument, is utterly annihilated. The offer of such evidence always presupposes that the instrument which it attempts to reform is used for a purpose not originally contemplated, and that it is so used, the parol evidence proposes to prove. If it must be admitted, on the ground that such abuse of the instrument constitutes a fraud, then the very fact is assumed, before the evidence is given which it is introduced to prove. This cannot be. Until the abuse or perversion of the written instrument is shown, no fraud appears sufficient to make way for the admission of parol evidence to affect it. The doctrine of those cases is, however, inapplicable to that which is now before us. Here is no attempt to use the in-

strument for a different purpose than that for which it was made.

There was no error, therefore, in rejecting the evidence, and none that we discover in this entire record.

The judgment is affirmed.

PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT OR VARY TERMS OF WRITTEN CONTRACT: *Adair v. Adair*, 71 Am. Dec. 779, and cases cited in the note 785; *Henry v. Henry*, Id. 354; *Pribble v. Kent*, Id. 327, note 330. Oral negotiations antecedent to an unambiguous written contract are inadmissible to control it: *Blossom v. Griffin*, 67 Id. 75, note 80, citing prior cases. But a party to a contract obtained by fraud cannot object to testimony tending to explain or contradict it: *Cushing v. Rice*, 71 Id. 579, note 581; *Harrell v. Hill*, 68 Id. 202. Parol evidence of an agreement when a note was made that it should be renewed at maturity would contradict the written contract of the parties, and is therefore inadmissible: *Anspach v. Bast*, 52 Pa. St. 359, citing the principal case.

AGE, IMBECILITY, AND UNDUE INFLUENCE AS PROOF OF FRAUD sufficient to set aside deed: See *Davis v. McNalley*, 73 Am. Dec. 159; *Ellis v. Mathews*, 70 Id. 353.

EXPERTS CONCERNING HANDWRITING, COMPETENCY OF: See *State v. Brown*, 70 Am. Dec. 168, note 176.

EXPERT TESTIMONY, WHEN ADMISSIBLE: Note to *Hammond v. Woodman*, 66 Am. Dec. 228-246; concerning handwriting: Id. 240. After direct evidence has been given on the subject of handwriting, the evidence of experts is admissible in corroboration: *Burkholder v. Plank*, 69 Pa. St. 235; *Reese v. Reese*, 90 Id. 94, citing the principal case. The principal case is cited and approved on the question of expert testimony, in *Travis v. Brown*, 43 Id. 17, which, however, holds that experts are not competent witnesses to make the comparison between genuine writings and the writing in question, and to testify to their conclusions from it, for this is the province of the jury.

FALSE REPRESENTATIONS INVALIDATING CONTRACT: See *Clem v. Newcastle etc. R. R. Co.*, 68 Am. Dec. 653, and cases cited in the note 654. The misrepresentation of a material fact is fraudulent, though unintentional: *Akars v. Brannan*, Id. 274, and note 280. The mere intent to commit a fraud which does not result in an act injurious to the person intended to be defrauded cannot be pleaded in bar of an action: *Keller v. Johnson*, 71 Id. 355. Damages as well as the fraud must be proved: *Bigby v. Powell*, Id. 163, and note 173. False representation to avoid a contract must be of a material matter, upon which the party whom it affects injuriously had a right to rely, and did rely: *Insurance Co. v. Reed*, 33 Ohio St. 292, citing the principal case.

DURESS, WHAT CONSTITUTES: *Harris v. Tyson*, 64 Am. Dec. 661, note citing prior cases 667. A deed cannot be invalidated by proving a threat to sue the grantor for a good cause of action: Id. A threat of lawful imprisonment is not duress: See *Eddy v. Herrin*, 35 Id. 261; *Moore v. Adams*, 32 Id. 723; note to *Mayor of Baltimore v. Lefferman*, 45 Id. 158, 159. In *National Bank of Oxford v. Kirk*, 90 Pa. St. 51, it is held that a promissory note is void where the consideration therefor is the promise of the payee that he will refrain from prosecuting the son of the maker for forgery, distinguishing the principal case on the ground that in the principal case there was a false representation that other persons threatened prosecution. In that case, however,

the decision rested at least partially upon a statute making criminal the compounding of a felony. The consideration was therefore unlawful. Mere threats of injury in regard to property without a power over it also to enable the party to execute his threats, are not in themselves duress *per minas*, however otherwise they may enter into questions of fraud or extortion: *Miller v. Miller*, 68 Id. 493, citing the principal case.

CHARLTON'S APPEAL.

[84 PENNSYLVANIA STATE, 473.]

EXECUTOR OR ADMINISTRATOR IS LIABLE FOR DEBTS DUE ESTATE LOST through his gross negligence in enforcing payment.

EXECUTOR OR ADMINISTRATOR IS TRUSTEE FOR COLLECTION AND DISTRIBUTION, NOT FOR INVESTMENT, and is liable for want of ordinary diligence in the collection of debts. His duty is unlike that of a guardian who is not bound to sue at once, but may leave the debt where he finds it, unless there is reason to apprehend danger.

EXECUTOR OR ADMINISTRATOR IS UNDER OBLIGATION TO DILIGENCE IN PREPARING FOR DISTRIBUTION, and cannot be justified in putting forth no efforts to collect a debt due the estate for a period of three, four, or five years.

WHERE ADMINISTRATOR HAS BEEN SURCHARGED ON EXCEPTIONS TO HIS ACCOUNT, the widow and all the heirs are entitled to participate in the entire fund as finally ascertained, though some of them did not except to the account.

APPEAL by Charlton, administrator of Carpenter, deceased, from a decree surcharging him with certain debts due the estate which had not been collected. The debts were balances due the estate from certain wards of whom the deceased had been guardian in his life-time. The guardianship accounts were filed by the appellant as his administrator, and the balances determined upon the confirmation of these accounts. Charlton made no effort to collect these claims, and upon exceptions to his administration account filed by the guardian of the five minor children of the deceased, the court surcharged him with the amounts of these claims, and distributed the final balance thus found to be in his hands among the widow and eight children of the deceased.

Roberts and Mellon, for the appellant.

R. B. Carnahan, for the appellees.

By Court, STRONG, J. We are not prepared to say that the orphans' court erred in holding the appellant accountable for the debts due the decedent's estate from Rebecca Dysart, and from Jeanette and Josephine Upperman. The auditor's report establishes that both these debts might have been collected;

they were ripe for execution, one in 1853, and the other in 1855, but no step was taken to collect the money. It is now said that the matter was purposely delayed, lest application should be made for bills of review. The possibility of such applications is quite an insufficient reason for the great delay. So the auditor thought, and his report finds that the appellant had been guilty of gross negligence; so gross that no man of ordinary prudence would have exhibited it in conducting his own affairs. The appellant was an administrator; he was a trustee for collection and distribution, nor for investment. His duty, therefore, was unlike that of a guardian. The latter is not bound to sue at once, but may leave a debt where he finds it, unless there is reason to apprehend danger; but an executor or administrator is under obligation to diligence in preparing for distribution. He cannot be justified in putting forth no efforts to collect a debt due the estate which he represents for a period of three, four, or five years, as in the present case. Not a solitary step appears to have been taken up to this day. The cases cited in regard to the liability of guardians are inapplicable to such a trust as the appellant's. The true rule will be found in *Johnston's Estate*, 9 Watts & S. 107. We do not desire to be understood as holding that an administrator is bound to sue immediately a debt due his intestate, or encounter the hazard of personal liability for it; such is not the rule, but he is responsible for the want of ordinary diligence. When he has suffered years to pass by without any effort to collect such a debt, or offering any excuse for his failure to proceed; when an auditor, on his account, has convicted him of gross negligence—we will not reverse the decree of the orphans' court confirming the report of the auditor.

The other exceptions urged against the decree are answered by the principles asserted in *Landis v. Scott*, 32 Pa. St. 504. The accountant having been surcharged with the two debts due the estate of the decedent, the original exceptions having been made to the account itself, and not to the distribution, the widow and all the heirs were entitled to participate in the entire fund as finally ascertained.

The decree of the orphans' court is affirmed, with costs.

EXECUTORS AND ADMINISTRATORS ARE NOT TRUSTEES FOR INVESTMENT: *Estate of Knight*, 73 Am. Dec. 531, and note. -

EXECUTOR OR ADMINISTRATOR IS NOT LIABLE FOR DEBTS NOT COLLECTED, except in cases of gross neglect: *Scarborough v. Watkins*, 50 Am. Dec. 523, and note 540; *Keller's Appeal*, 49 Id. 516; *Bailey v. Dilworth*, 48 Id. 760.

CASES
IN THE
SUPREME COURT

OF

RHODE ISLAND.

BARTLETT v. BROWN.

[6 RHODE ISLAND, 87.]

ACTION FOR MALICIOUS PROSECUTION SUPPOSES BOTH PLAINTIFF'S INNOCENCE of the charge upon which he has been prosecuted, and also want of probable cause of his guilt. If there be real guilt, or apparent guilt believed by the prosecutor to be real, the most express malice in prosecuting will not support the action.

PARTY PROSECUTING ANOTHER UPON CHARGE THAT HE STOLE, took, and carried away cultivated fruit growing upon the lands of the prosecutor, is not, after the quashing of the criminal complaint, liable to an action for malicious prosecution, where the complaint, though containing words of harsh surplussage, was substantially true.

ONE WHO FULLY AND FAIRLY STATES FACTS TO HIS COUNSEL, whose candor and skill he has no reason to doubt, on whose advice he signs and swears to a criminal complaint against another, is protected by such advice from an action for malicious prosecution instituted against him after the quashing of the criminal complaint.

CASE for malicious prosecution. The criminal proceeding, for the prosecution of which this action was brought, was quashed by the magistrate because the complaint did not allege in the language of the statute that the fruit was taken and carried away "without the consent of the owner thereof." The other facts are sufficiently stated in the opinion.

Ballou and Payne, for the plaintiff.

Robinson, for the defendant.

By Court, **AMES, C. J.** The action for malicious prosecution supposes not only the plaintiff's innocence of the charge upon which he has been prosecuted, but want of probable cause of

his guilt. The grounds of it are, "on the plaintiff's side, innocence, and on the defendant's, malice:" *Per* Parker, C. J., *Jones v. Gwynn*, 10 Mod. 217; and if there be real guilt, or apparent guilt believed by the prosecutor to be real, the most express malice in prosecuting will not support the action: *Johnstone v. Sutton* (in error), 1 T. R. 544.

In the case before us, it seems that the defendant procured the arrest of the plaintiff upon the charge that he feloniously stole, took, and carried away cultivated fruit, to wit, ripened cherries, the property of, and growing upon the lands of, the defendant; which, inasmuch as theft cannot be committed of such a subject, is not a defective charge of theft, but a harsh mode of charging our statute offense of taking growing fruit without license of the owner. If the defendant had spoken such words of the plaintiff, proof of them would not have supported an action by the latter for a slanderous accusation of theft, but would be deemed to amount to a charge of trespass only; and whether written or spoken, the legal construction of them must be the same.

Had this substantial charge been false, as well as malicious, it would, on account of the vexation and expense caused by it, have supported an action for malicious prosecution. We are satisfied, however, from the proof, that the plaintiff did, on more than one occasion, pick cherries from the trees of the defendant, as he passed under them along the street, without his leave. The complaint, therefore, though containing words of harsh surplusage, was substantially true, and upon this ground the defendant is entitled to judgment.

But if this were otherwise, there is another ground upon which, as it seems to us, the defense to this action is full. We are satisfied from the proof that the defendant fully and fairly submitted his cause of complaint against the plaintiff to a counselor of this court, residing in Woonsocket, for his professional advice and aid; that under his direction the complaint was made, and that, the complaint being filled in with his own hand, its objectionable form was caused by his misrecollection of the statute concerning the taking of growing fruit, or at any rate, without fault or neglect on the part of the defendant. There is no evidence which leads us to suspect that the defendant, a laboring man, doubted, or had cause to doubt, the soundness of the legal advice given to him, or suspected even when he signed and swore to the complaint prepared for him by a professional man, that there was a misnomer

of the offense therein charged. To the defendant, then, it was a case of apparent guilt of theft, believed by him to be real; and this, according to the resolution of the judges, reported to the house of lords by Lords Mansfield and Loughborough, in the case of *Johnstone v. Sutton*, 1 T. R. 544, before cited, will not support an action for malicious prosecution, even though the most express malice be proved in the prosecutor. In other words, though there be malice, there is probable cause; and the former must concur with the want of the letter to the maintenance of the action.

Although there has been some question how far the advice of counsel can shield a defendant in an action of this sort, yet the weight of authority, and as it seems to us the more reasonable opinion, is, that if the defendant is not in fault, but has been wrongly advised as to his rights, upon a state of facts fully and fairly presented by him to a professional man, whose candor and skill he had no reason to doubt, the advice will be a sufficient protection for him: *Hewlett v. Cruchley*, 5 Taunt. 277; *Snow v. Allen*, 1 Stark. 502; *Ravenga v. Mackintosh*, 2 Burn. & Cress. 693; *Blunt v. Little*, 3 Mason, 102; *Stone v. Swift*, 4 Pick. 393 [16 Am. Dec. 349]; *Thompson v. Mussey*, 3 Greenl. 310; *Stevens v. Fassett*, 27 Me. 266; *Hall v. Suydam*, 6 Barb. 83; *Walter v. Sample*, 25 Pa. St. 275; *Kendrick v. Cypert*, 10 Humph. 291; *Chandler v. McPherson*, 11 Ala. 916; *Williams v. Vanmeter*, 8 Mo. 339 [41 Am. Dec. 644]; *contra*, *Clements v. Ohrlly*, 2 Car. & K. 686, 689, *per* Lord Denman.

For these reasons, our judgment must be for the defendant.

MALICE AND WANT OF PROBABLE CAUSE MUST BE SHOWN in an action for malicious prosecution: See *Mooney v. Kennett*, 61 Am. Dec. 576, note 580, where other cases are collected; *Bixby v. Brundige*, Id. 443, note 444, where the question is considered whether an action lies for malicious prosecution before a court having no jurisdiction of the offense: *Griffin v. Chubb*, 58 Id. 85, note 93, collecting prior cases.

PROBABLE CAUSE IN ACTION FOR MALICIOUS PROSECUTION: See *Parker v. Huntington*, 66 Am. Dec. 455, note 456, where other cases are collected.

ACTING UNDER ADVICE OF COUNSEL, EVIDENCE OF, TO REBUT MALICE in a criminal prosecution: See *Yocum v. Polly*, 36 Am. Dec. 583, note 586, where other cases are collected.

SPRAGUE v. RHODES.

[6 RHODE ISLAND, 56.]

COURT OF EQUITY WILL NOT RETAIN BILL TO ABATE DAM which flows plaintiff's lands, until his title is established at law, where there has been a user by the defendant for upwards of forty years, under an alleged claim of right, but will dismiss the bill with costs.

BILL in equity to abate a dam maintained by the defendants at the outlet of Mashapaug pond, in Cranston, which, it was alleged in the bill, caused water to flow back upon the lands of the plaintiffs, and created a nuisance thereon. The defendants, in their answer, set up as defenses, that they and those from whom they claimed title had maintained the dam, under a claim of right, for upwards of forty years before the filing of the bill, paying the plaintiffs and those under whom they claimed a compensation for the flow upon their lands, the last payment having been made in 1852, in full of all damages up to August 1, 1850; and that they had never refused to pay such compensation. The facts admitted by the plaintiffs, and relied upon by the defendants, were: One William Potter, about the year 1809, owned the premises at the Mashapaug pond described in the bill, and erected on them a mill and the dam in question. Potter ran this mill and maintained the dam until 1820, when he sold the factory estate, including the land and buildings, one undivided moiety to the defendants Rhodes and others, under the firm name of the Bellefonte Manufacturing Company, and the other moiety to Thomas Sprague. At the time of this conveyance, said company owned and operated the Bellefonte mill, situated about a mile and three quarters below said dam, upon the same stream, and still owned by the defendants Christopher and Robert Rhodes, and George C. and Phebe Arnold; and said Thomas Sprague owned and operated a mill, since known as the Cunliff mill, on the same stream, and between the Bellefonte and Mashapaug mills, which Cunliff estate is now owned by the defendants Bowen and Batty. In 1829, the Mashapaug mill, having become dilapidated, was taken down, and has never been rebuilt, but said Mashapaug dam is still maintained for the use of the Bellefonte and Cunliff mills. The undivided moiety of the Mashapaug estate and privilege belonging to the owners of the Cunliff mill has always been conveyed therewith. Compensation has been paid by the respondents and those from whom they claim to the complainants for every year that the complainants' land has

been flowed, up to the year 1850. The respondents have never refused to pay since that time, although they have neglected so to do. Other facts appear from the opinion.

Bradley and Metcalf, for the complainants.

Matthewson, for the respondents.

By Court, AMES, C. J. It is evident that this case is not one for the specific action invoked by the bill. The right of the plaintiffs, so far from being clear from what has been disclosed at the hearing, is embarrassed in the first place by the question under our mill act. This, it is true, we might, as incidental to the relief, decide; but then, again, the title is rendered, at the very least, doubtful, by the mixed question of law and fact which the case raises, to wit, whether the defendants have not, by the adverse enjoyment of themselves and of those under whom they claim for upwards of twenty years under a claim of right, gained a title, as against the plaintiffs, to keep up this dam for the use of their mills, upon paying a reasonable compensation for flowage. These are questions for a court of law; and the last peculiarly so, not only from its exclusively legal character, but from the kind of proof which it involves, proper to be submitted only to a jury.

No doubt a court of equity may, when it finds the plaintiff's title embarrassed by mixed questions of law and fact, retain the bill and give the plaintiff liberty to bring an action at law or make up issues at law fitted to resolve those questions. But in a case like this, where the title of the plaintiffs, doubtful under the statute at best, has been suffered by them to be weighed down by upwards of twenty years' user of the defendants, which, so far as we can see, was adverse, the proper course of the plaintiffs was, before filing their bill, to have asserted their title at law; and afterwards, if there successful, to come here for redress against a continued resistance to their established legal rights.

There is no reason apparent for their coming into this court in the first instance, such as there would be if they were suffering an irreparable mischief which demanded the interposition of the court, pending the litigation at law; or if they required the aid of the court to insure them, by way of condition upon the other party in the matter of proofs, or by discovery, a fair trial at law. Nothing of this sort is even pretended; but it is the bald case of plaintiffs coming into this court to

abate a mill-dam, or the dam of a reservoir for the use of mills, on account of the flowage of land caused thereby, when they have accepted compensation for the flowage from 1809 to 1850; the dam having been kept up as a mere reservoir dam at least from 1832 to the filing of this bill in 1855, notwithstanding as one of the plaintiffs swears he disputed the right of the defendants to maintain it. It is singular, if the right were really contested by him, that he did not, in all this course of time, contest it in the effectual form of an action at law, by which it might have been settled for or against him. And during the three years and upwards that this bill has been pending, it is again singular that no application has been made to the court by the plaintiffs for liberty to bring an action at law to establish their title.

In the leading case upon this subject of *Bacon v. Jones*, 4 Myl. & C. 433, S. C., 18 Eng. Ch. 432, Lord Cottenham says that he could "find no case in which the court has thought it right to retain a bill, simply for the purpose of enabling a plaintiff to do that;" that is, to bring an action at law to settle his title, "which these plaintiffs might have done at any time during the last four years;" referring to the period of time which had elapsed since the plaintiffs knew of what they claimed to be an infringement of their right. But what should be said of retaining a bill until the right was settled at law, after a delay of the plaintiff to bring an action for upwards of twenty-six years since he obtained such knowledge? What should be said of a delay to sue so protracted, and an adverse user on the other side so long continued, that it has become a grave question at least whether the user has not ripened into a right? Under such circumstances, we can give no relief upon this bill, nor find any precedent for retaining it until the title of the plaintiffs is settled at law; and as upon this ground the bill must be dismissed with costs, we purposely abstain from touching upon the matters of law and fact concerning the title, as well as upon the ground of equitable estoppel set up in the answer.

Bill dismissed, with costs.

ONE STANDING BY AND PERMITTING ERECTION OF STABLE, and having the right to prevent it, cannot invoke the aid of the court to enforce a remedy in equity for its removal: *Whitney v. Union Railway Co.*, 71 Am. Dec. 715, and note 722.

STATUTE OF LIMITATIONS IN EQUITY: See *Tinney v. Melons*, 60 Am. Dec. 205, note 212.

FITZPATRICK v. FITZPATRICK.

[6 RHODE ISLAND, 64.]

MINUTES OF TESTIMONY OF WITNESS, TAKEN BY JUDGE IN COURSE OF TRIAL
 had before him, are admissible in another case, in which such witness is a party, as evidence of an admission made by him in such testimony, when the judge testifies that such minutes were made by him at the trial, and that he believes them to be correct, although he also swears that he does not recollect the testimony of the witness, and that the minutes fail to recall it to his memory.

DESCRIPTION OF LAND IN NOTICE OF MORTGAGEE'S SALE UNDER POWER
 contained in the mortgage, by a reference to a plat or deed on record, is sufficient; nor is it necessary that such notice be signed by the mortgagee, when the power authorised and required it to be given by the assignee, who might sell under it.

WHERE DEED IS SO DEFECTIVELY EXECUTED UNDER POWER IN MORTGAGE
 as to be void, and is followed by a quitclaim deed from the grantees therein to the mortgagee who sold under the power, the former deed may be corrected by the parties, by interlineations, and both deeds being re-acknowledged and recorded anew as of a subsequent date, may be regarded as redelivered as of the new date, so as to take effect from their redelivery.

IN ACTION OF TRESPASS AND EJECTMENT, PLEAS OF NOT GUILTY AND OF SOIL AND FREEHOLD look to the state of things at or before the commencement of the action, and if matter of discharge accrue to the defendant pending the action, it must be pleaded to the further maintenance of the action, if it has arisen after suit, but before plea or continuance, and *pais darrein continuance*, if after plea or issue joined. A defendant in such action cannot, therefore, protect his possession by setting up an outstanding mortgage of the plaintiff's ancestor purchased in by the defendant pending the action, nor by setting up such a mortgage discharged of record before the commencement of the action, but assigned to him pending the action, although he proves that the mortgage was purchased by him before the commencement of the action and discharged by the mistake of the mortgagee instead of being assigned.

AS GENERAL RULE, NO QUESTIONS CAN BE CONSIDERED ON MOTION FOR NEW TRIAL except those that were raised at the trial; but where the facts, as allowed by the judge and conceded by both parties, show a fatal defect in the title of the plaintiff in an action of trespass and ejectment, which could not have been obviated by further proof on his part, the court may, on such a motion, consider the point still open and dispose of the case in such a manner as justice seems to require.

OMISSION IN NOTICE OF MORTGAGEE'S SALE TO NAME TIME AND PLACE of the sale is fatal, and renders such notice invalid.

TRESPASS and ejectment to recover possession of lot of land in the north part of the city of Providence. Pleas, the general issue, and soil and freehold in the defendants. At the trial, it appeared that the plaintiffs, who were infants, claimed title as the children and sole heirs at law of Martin Fitzpatrick. The lot was formerly owned by William Donnelly,

who mortgaged it to the defendant Edward Fitzpatrick, which mortgage contained a power of sale to said Edward, his heirs, executors, administrators, and assigns, he or they "first giving three months' notice of such sale, and of an adjourned sale, two weeks, in some public newspaper in said Providence." To prove the assignment of this mortgage by Edward Fitzpatrick, to their father, Martin Fitzpatrick, the plaintiffs submitted evidence tending to prove that the original assignment of the mortgage was formerly in the possession of Martin, that Edward, who had access to the place where it was kept, had taken it and refused to produce it. They then offered, as secondary proof of the same, a certified copy from the registry of deeds in Providence, together with the testimony of Hon. William R. Staples, late chief justice of the supreme court, to his minutes of the sworn admission of Edward, taken on a trial before him, from which it appeared that said Edward, as a witness, swore that he had assigned said mortgage to Martin, and had received from him a consideration therefor. Judge Staples produced the minutes in his handwriting, but stated that he did not recollect the testimony at all, even after reading his minutes, but that they were the minutes taken by him as judge presiding at the trial, and that he presumed they were correct. The plaintiffs, in further proof of their title, offered evidence tending to prove that said Martin advertised in the "Providence Journal" for the length of time required by the power in the mortgage, the following notice: "Mortgagee's sale.—Will be sold by public auction on Friday, April 19, 1850, by virtue of a power of sale contained in a deed of mortgage, made and executed by William Donnelly, August 23, 1849, a certain lot of land, with the buildings and improvements thereon, situate in the northerly part of the city of Providence, being the lot of land numbered (10) ten, on a plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7, 1845. By order of the mortgagee." The plaintiffs then submitted proof that on the nineteenth of April, 1850, the lot was sold to John Doran, as the highest bidder, and in further evidence of their title offered the deeds described in the opinion. To maintain the issues on their part, the defendants offered in evidence a mortgage deed of the premises of a date prior to the mortgage under which the plaintiffs claimed, but assigned to Edward Fitzpatrick after the commencement of this action. They also offered in evidence a mortgage deed of the premises, made by Martin Fitzpatrick to Mowry and Steere, and as

assignment thereof to Edward Fitzpatrick, which latter is the mortgage referred to in the opinion. The other facts necessary to an understanding of the case are stated in the opinion.

James Tillinghast, for the motion.

Currey, against the motion.

By Court, AMES, C. J. The first ground for new trial, set down in this motion, that the judge presiding at the trial admitted the minutes taken by Judge Staples when trying a case, of the testimony of one of the defendants, for the purpose of proving that defendant's admission, is clearly untenable. The objection made to the admissibility of this evidence is, that the judge could not recollect the testimony independent of his minutes, nor refresh his memory with them of what the testimony was, but could merely swear that they were taken by him as judge in the course of the trial of a case before him, and that he believed them to be correct. Such minutes are taken by every judge in our supreme court and court of common pleas, as a necessary part of his official duty in the trial of causes; in order, not only to enable him to instruct the jury in the law applicable to the facts, which by law he must do, or to sum up the evidence to the jury, which by law he may do, but to enable him to allow grounds for new trial, founded upon the evidence, under the rules and bills of exceptions, under the requirement of the statute. Numerous as trials, and, consequently, voluminous as such minutes must necessarily be, to apply to them the strictest rule that can be found with regard to the voluntary exceptional memorandum of an ordinary witness would be to banish them as a source of evidence for the numerous and important purposes, in the administration of justice, for which they are needed; since no judge, unless possessed of a superhuman memory, could, in general, truly testify further than Judge Staples testified in this case, that these were his minutes of what took place before him, written by him at the time, and that he believed them to be correct. We think that the fair presumption decidedly is, that they are correct; and that if rules of evidence are designed to elicit and not to obstruct the passage of truth to a jury, they ought to be admitted as evidence, with such verification of them as in the nature of things is possible. It would be quite easy to hunt up cases which would justify the admissibility of the ordinary memoranda of a witness, unofficially taken to re-

fresh his memory, upon quite as slight a basis of recollection as existed in the case before us. References to some of them may be found in 1 Greenl. Ev., sec. 437, note 3. But such minutes as these stand, and are admissible as evidence, upon their own peculiar grounds. They occupy a place midway between official records and ordinary unofficial memoranda; and are the highest kind of minutes or entries, as in relation to accounts they are called, made in the course of business. The distinction between memoranda or entries of facts, and memoranda of what is said, adverted to at the argument, has no application to them; since it is the official duty of the judge, because necessary to enable him properly to perform the duties of his office, to take minutes of what is said by witnesses in giving their testimony. With every guaranty for their general correctness, which official position and duty, and even necessity, that they may answer their immediate purposes, can throw about them, it would be strange, indeed, if they were not receivable in evidence, subject to contradiction, of course, without other confirmation than the testimony of the judge as to the occasion on which he took them, and that he believes them to be correct: See *Rez v. Whitehead*, 1 Car. & P. 67; *Miles v. O'Hara*, 4 Binn. 110, 111; *Eastman v. Cooper*, 15 Pick. 287 [26 Am. Dec. 600].

The second ground for new trial alleged in the motion this court has before had occasion to consider in the analogous case of the advertisement by a sheriff of a sale under the levy of an execution on real estate: *Childs v. Ballou*, 5 R. I. 537; and we see no reason, either upon principle or authority, to doubt the correctness of what is there intimated, that in such a notice, given to call together purchasers, and to enable them to ascertain with certainty what is offered for sale, a description of the premises to be sold, by reference to a plat or deed on record, is sufficient. Any description which can be given will be unintelligible to one unacquainted with the locality, and the more precise the more unintelligible; and the description of the premises in this notice, to wit, "a lot of land, with the buildings and improvements thereon, situate in the northerly part of the city of Providence, being the lot of land numbered (10) ten on the plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7, 1845;" which plat it is agreed, as well as the mortgage under which the sale was made was recorded, is quite as intelligible to purchasers as any that can be imagined.

The only other objection to this notice of sale taken at the trial, to wit, that it was not signed by the mortgagee, is equally untenable. The power authorized—nay, required—that it should be given by the assignee, who might sell under it; and to answer the only purpose of it, in calling together purchasers, it was equally effective, whether signed by the mortgagee or not.

The third ground for new trial is, in substance, that after the delivery by Martin Fitzpatrick of his deed to Doran, and Doran's delivery of his deed of quitclaim to Martin Fitzpatrick, which took place on the nineteenth day of April, 1850, it was discovered that the deed by Fitzpatrick under the power ran in his own name, instead of that of his principal, Donnelly; whereupon the parties, on the second day of May following, came before the city clerk, who was the witness to both deeds, and corrected the error in the first deed by interlineations, and then reacknowledged both deeds, and had both recorded by the city clerk anew, and as of the date of May 2d. What more complete proof of the redelivery of both deeds can be given? It is old law that "as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words;" the matter depending upon the intent of the parties: Shep. Touch. 58, note 3. It is true that "regularly there may not be two deliveries of a deed; for where the first delivery doth take any effect at all, the second delivery is void;" but we are also informed in the same sentence that if the deed, as first delivered, is merely void, or doth become void by matter *ex post facto*, and the party deliver it again, "by this means the deed is become good again:" Id. 60. Now, in the case before us, the deeds were either good to pass the title as first delivered, or they were not. If they were, the title passed by the first delivery; and if not, by the second; and so, *quacunque via*, the title passed. It is evident that this ground for new trial wholly fails.

The remaining ground for this motion, that the judge presiding at the trial refused to allow the defendants to protect themselves against the action by setting up outstanding mortgages made by the father of the plaintiffs, and purchased in by one of the defendants after the commencement of the suit, can find no support, either in principle or respectable authority.

In a real action, like our action of trespass and ejectment, the pleas of not guilty, and of soil and freehold, look to the state of things at or before the commencement of the action;

and if matter of discharge accrue to the defendant pending the action, as from the plaintiff's release, or the like, it must be pleaded to the "further maintenance of the action," if it has arisen after suit, but before plea or continuance; and *puis darrein continuance*, if after plea or issue joined: *Evans v. Prosser*, 3 T. R. 186; *Le Bret v. Papillon*, 4 East, 502. In the courts of Massachusetts, a mortgage of the ancestor of the demandant, acquired pending a writ of entry, cannot be set up by the tenant to support a title defective at the commencement of the writ, even though pleaded *puis darrein continuance*: *Curtis v. Francis*, 9 Cush. 428, 443, 444.

Nor was this species of defense aided in case of the mortgage to Mowry and Steere assigned to one of the defendants after the commencement of the suit, by the proof offered, that in fact the mortgage was purchased by the defendant some three years before the commencement of the action, but by mistake at the time of purchase, was discharged upon the record instead of being assigned. By the express words of chapter 149, section 8, of the revised statutes, it is enacted that a discharge so made "shall forever afterwards discharge, defeat, and release such mortgage, and perpetually bar all actions to be brought thereupon in any court." Nothing can be stronger than these words to show that by such a discharge the legal title under the mortgage was discharged, and, at all events, never vested in the defendant until after the commencement of the action. Under the pleas, the question was merely as to the place of this title, whether in the plaintiffs or defendants, at the commencement of the suit; and whilst, on the one hand, we know of no power in a court of law, upon the plainest proof, to reform the deeds and documents executed by mistake so as to make them conform to the true intent of the parties, we do not see how, if they could, it would help the case of defendants, unless they could also make their act of reformation, or that of the parties, done pending the suit, relate back and take effect as of a time anterior to its commencement. For these reasons, this motion must be refused upon all the questions raised at the trial.

As a general rule, no other than such questions can be considered upon such a motion; but where the facts, as allowed by the judge, and conceded by both parties, show a fatal defect in the title of the plaintiffs, now relied upon in defense, and which, if noticed at the trial, could not have been obviated by further proof on the part of the plaintiffs, courts have felt

authorized to consider the point as still open, upon such a motion as this, and to dispose of the case in such a manner as justice would seem to require: *Slater v. Rawson*, 1 Met. 450-458; and see *Maynard v. Hunt*, 5 Pick. 240-243.

Now such a point, which, in the hurry of the trial and the sudden introduction of the evidence, escaped the attention of the counsel for the defendants at the trial, has now been brought to our notice. The notice of the sale under Donnelly's mortgage, of which an advertisement for the period of three months prior to the sale, in some public newspaper printed in Providence, is required, as a preliminary to a sale under the power, is, upon inspection, found defective in the indispensable requisites of naming the time, to wit, the hour of the day, and the place of the sale. Such a defect defeats the whole purpose of the notice, which, as we view it, is to bring together such a body of purchasers as by fair competition will insure, as far as this goes, a full price for the subject of sale. Where, as in such a case, the question is simply whether the power be well executed or not, the question is merely one at law; and so far from being, as argued by the counsel for the plaintiffs, a question in equity only, if there is nothing more in the case, a bill in equity to set aside the execution of the power cannot be maintained: *Tichburn v. Leigh*, 6 Vin. Abr. 365, pl. 14; 2 Sugden on Powers, c. 11, sec. 1, art. 13, p. 180.

This defect appears in the only proof brought into the case by the plaintiffs to show the manner in which, as the attorney of Donnelly, Martin Fitzpatrick executed the power of sale contained in the mortgage assigned to him, and this proof, so far as has been disclosed, is the only proof upon that subject. It is fatal to the plaintiffs' title, since, if the power was not well executed, the mortgage still remains, and the action for the recovery of the mortgaged premises should have been brought by the personal representative of Martin Fitzpatrick, instead of by his heirs.

For this cause, the verdict must be set aside, and a new trial granted.

NOTES OF JUDGE AS EVIDENCE: See *State v. DeWitt*, 27 Am. Dec. 370.

NOTES OF TESTIMONY ON FORMER TRIAL: See *Ash v. De Rossett*, 72 Am. Dec. 552, note 555, where other cases are collected.

NOTICE OF SALE, WHAT IS PROPER AND SUFFICIENT: See *Hoffman v. Anthony*, post, p. 701, and note, where this subject is discussed. A notice of a mortgagee's sale is good, although not signed by the mortgagee or his assignee: *Woonsocket I. S. v. American Worsted Co.*, 13 R. I. 256, citing the principal case.

NEW ENGLAND COMMERCIAL BANK v. NEWPORT STEAM FACTORY. MUNROE v. SAME.

[6 RHODE ISLAND, 154.]

WHERE CHARTER OF CORPORATION PROVIDES THAT EXECUTIONS AGAINST IT SHALL BE LEVIED ON CORPORATE PROPERTY, and that in case of want of such property, the stockholders, who were such at the time the liability was incurred, shall be liable in their own persons and estates as if the liability had been incurred by them personally, a judgment creditor of the corporation, whose execution has been returned wholly unsatisfied for want of corporate property upon which to levy it, may maintain an action at law for the recovery of his debt against the living stockholders of the corporation liable therefor, as joint contractors or copartners. But a creditor of such corporation, who wishes to pursue the estate of a deceased stockholder, can only do so in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, will construe it to be several as well as joint.

CREDITOR OF CORPORATION UPON WHOSE STOCKHOLDERS IS IMPOSED JOINT LIABILITY in the nature of that of copartners may pursue the estate of a deceased stockholder liable to his debt, for payment out of the same, without reference to the state of accounts between the stockholders and the corporation, or to their solvency or insolvency, leaving the estate to seek repayment from the corporation, or contribution from those liable to it. And there is no objection, on the ground of multifariousness, to such creditor's seeking, in the same bill, relief out of the estates of two or more deceased stockholders, which are all liable for his debt. But such creditor's right is only to the surplus of the separate estate of the deceased stockholder after all its expenses and separate debts have been paid.

ONLY THOSE CAUSES OF ACTION *EX CONTRACTU* CAN BE JOINED IN SAME SUIT to which all the parties defendant were originally liable.

IN SUIT AGAINST ESTATE OF DECEASED STOCKHOLDER FOR PAYMENT OF CORPORATE DEBT, all the living stockholders, and the representatives of deceased stockholders, being interested in the account to be taken, should be made parties defendant to the bill. And if the real estate of such deceased stockholder is sought to be charged, his heirs in case of intestacy, and devisees if there be a will, must also be made parties defendant to the bill.

CREDITOR OF CORPORATION WHO GIVES UP OLD NOTES AND TAKES NEW ONES, after a stockholder has withdrawn from the corporation by making sale of his stock and giving due public notice thereof as required by the charter, thereby releases such stockholder from the debt.

SUIT AGAINST EXECUTOR OF DECEASED STOCKHOLDER, FOR CORPORATE DEBT, IS BARRED by the lapse of three years from the date of the publication by him of notice of his appointment and qualification as such executor.

ACTIONS at law and bills in equity brought by creditors of the Newport Steam Factory, an insolvent manufacturing corporation, to enforce their debts against the surviving, and the estates of the deceased, corporators, under the personal-liability clause of the charter of the corporation. The corporation was incorporated by the act of assembly in 1831, which act was

amended in the particulars mentioned in the opinion, in 1840. On the fifteenth day of February, 1858, the corporation, being insolvent, and largely indebted to the New England Commercial Bank of Newport and to Josiah S. Munroe, made an assignment to Seth W. Macy of all their real estate for the equal benefit of all their creditors. The assignee realized about sixteen thousand dollars from the sale of the property assigned, and still had on hand a portion of the land unsold. In February, 1858, the bank recovered against the corporation two judgments, one for nineteen thousand four hundred and ninety-nine dollars, and the other for seventeen thousand eight hundred and seventy-seven dollars. Executions issued on these judgments, and were delivered to the sheriff of Newport county, who returned them wholly unsatisfied, being unable to find any property of the company upon which to levy them. In April, 1858, Josiah S. Munroe also obtained two judgments against the corporation, one for three thousand six hundred and three dollars and thirty-one cents, and the other for seven thousand and sixty-two dollars and twenty-eight cents. Upon these judgments, executions were also issued, and were returned unsatisfied, for want of any estate of the company upon which they could be levied. The present actions and suits were then brought by said judgment creditors to enforce their respective judgments against such living stockholders, and the estates of such deceased stockholders, as they deemed liable, under the charter of the company, to pay the same. The actions at law and their positions before the court were as follows: *First.* An action on the case against Seth W. Macy, administrator of Joseph Weaver, deceased, the declaration in which alleged that Weaver was a shareholder at the time when a portion of the plaintiff's claim was incurred, and thereby became liable for and promised to pay the same; that Weaver's estate had been represented insolvent; that the claim of the plaintiffs had been presented to and rejected by the commissioners of said estate, and that the plaintiffs were compelled to pursue their remedy at law against Weaver's administrator. To this declaration the defendants pleaded the general issue. *Second.* A similar action by the same plaintiffs against Samuel Allen, executor of Samuel Allen, deceased, with similar averments in the declaration. To this action the defendant had pleaded the general issue. *Third.* A similar action by Josiah S. Munroe against Seth W. Macy, administrator of Joseph Weaver, deceased, with like averments in the

declaration. To this action no plea was filed. *Fourth.* A similar action by the last-named plaintiff against Daniel Tisdale, James F. Simmons, George Bowen, Stephen B. Chase, John Stevens, Benjamin H. Stevens, William C. Gibbs, Edward W. Lawton, and Benjamin Finch, the declaration alleging them all to have been stockholders when the liability was incurred by the company. This action was commenced in the court of common pleas, and the defendants having submitted to judgment in that court, brought the case by appeal to this court. The defendants pleaded: 1. In abatement, that Weaver, when in life, was a stockholder in the corporation, and so remained at the time of his death in 1857; that in 1857 said Macy was appointed and qualified as administrator of his estate, "whereby and by virtue of the premises, the defendants aver that the said several contracts referred to in the plaintiff's declaration as having been made with the Newport Steam Factory, and the liability there set forth, was incurred jointly with the said Seth W. Macy, administrator, as he, by virtue of his office, was a stockholder of the said corporation at the time the debt was contracted, and the liability incurred upon which the plaintiff obtained his judgment; wherefore, because said Macy, administrator of said Weaver, is not named in said writ and declaration together with the said defendants, they pray judgment of said writ and declaration, and that the same may abate," etc. To this there was a general demurrer filed by the plaintiff, in which the defendants joined. 2. The second plea was in abatement, that, at the time of the commencement of the action, a large amount of the property of the company had not been exhausted, and which, by force of the act incorporating the company, ought to have been levied upon and applied to the satisfaction of the plaintiff's judgment, before commencing this action against the defendants. To this plea the plaintiff replied: 1. By traversing the allegation that the corporation had at the commencement a large amount of property upon which his execution might have been levied, and concluding to the country. 2. By alleging his recovery of judgment, the issuing of execution, its delivery to the sheriff, and his return of the same wholly unsatisfied. This replication concluded to the country. 3. By demurring generally. 4. By pleading the general issue, in which the defendants joined. 5. The fifth action to enforce payment of the judgment for three thousand six hundred and three dollars and thirty-one cents, was similar to the fourth.

and the pleadings were the same except that no demurrer was filed to the second plea in abatement. 6 and 7. These seem to have been actions brought by the bank against George Bowen and others as stockholders of the company, but the declarations and writs were missing. Two bills in equity were filed by the New England Commercial Bank to enforce their claims against the stockholders and the estates of stockholders of the corporation: 1. The first was filed on behalf of the bank and of such other creditors as might come in and contribute to the expenses of the suit, against Mary L. Ruggles, in her own proper person, and as administratrix of the estates of Nathaniel S. Ruggles, her husband, and of John P. Ruggles, her son, late of Newport; Seth W. Macy, administrator of the estate of Joseph Weaver, deceased; Pernissa Gyles, executrix of Charles Gyles, deceased; Samuel Allen, executor of Samuel Allen, deceased; John Stevens, Benjamin H. Stevens, George Bowen, Stephen B. Chase, William C. Gibbs, Edward W. Lawton, Daniel Tisdale, James F. Simmons, and the Newport Steam Factory. The bill alleged the indebtedness of the company, and stated how it arose; that the living defendants were stockholders at the time when said indebtedness accrued, and that said Weaver, Allen, and Ruggles, now dead, were also stockholders at that time. The bill then goes on to state the recovery by the complainants of the judgment already described for nineteen thousand four hundred and ninety-nine dollars, and the issue of execution thereon, and the return of the same unsatisfied. It also alleges the death of said Weaver, Ruggles, Gyles, and Allen, and the appointment of their personal representatives above named. The bill prayed that an account might be taken of the respective personal estates of said Ruggles, Weaver, Gyles, and Allen, and that the balance of said personal estates after the payment of their separate debts might be applied to the payment of the plaintiff's debt, and of the debts of the other unsatisfied creditors of said corporation; and that if such balance be found insufficient for that purpose, an account be taken of the rents and profits of the real estates of the said deceased, and that the amount so found be applied to making good such deficiency; and that in case such rents and profits should prove insufficient, that a sum of money be raised by sale or mortgage of such real estates respectively, and that the money so raised be paid to the plaintiffs and to the other unsatisfied creditors of the corporation, and for general relief. To this bill the defendants Macy,

Gyles, Allen, John Stevens, Bowen, Lawton, Gibbs, and Simmons, filed their several answers. The other defendants filed no answers. The answer of Macy set up that George Hall, Edward King, and the firm of J. T. & P. H. Rhodes, were stockholders when said debt of the plaintiffs was incurred, and ought therefore to have been made parties defendant to the bill. The facts alleged in the answer of Pernissa Gyles are sufficiently stated in the opinion. The other answers set up defenses of non-joinder of parties and misjoinder both of parties and causes of action, and also other defenses not necessary to a correct understanding of the points decided. 2. The second bill was filed to enforce payment of the judgment for seventeen thousand eight hundred and seventy-seven dollars against Seth W. Macy, administrator of Joseph Weaver, deceased, Benjamin Finch, John Stevens, Benjamin H. Stevens, George Bowen, Stephen B. Chase, William C. Gibbs, Edward W. Lawton, Daniel Tisdale, James F. Simmons, and the Newport Steam Factory. This bill, after alleging that the above-named parties were stockholders in the company, and the recovery by the complainants of the judgment last referred to, the issuance of execution thereon and the return thereof unsatisfied, proceeded to state that Weaver died in 1856; that in the same year Macy was appointed his administrator; that plaintiffs frequently demanded payment of their debt from the corporation, from Weaver in his life-time, and from Macy, his administrator, since his death, who have neglected and refused to pay the same, or any part thereof. The bill prayed that Macy be directed to pay from the proceeds of the estate of Weaver, if sufficient, the amount of their said judgment, with interest and costs, and that the other defendants be directed to pay any deficiency in the payment by Macy, and for further relief. Macy filed his answer to this bill, alleging that he had represented the estate of his intestate to be insolvent, the appointment and qualification of commissioners to receive and examine claims against the same, and that the plaintiffs had presented no claims against said estate. He also alleged that Ruggles and Gyles were, in their life-time, stockholders of the corporation; that, upon their decease, their shares became and were the property of their respective personal representatives, Mary L. Ruggles and Pernissa Gyles; that the corporation, without his intestate's consent, undertook to purchase from said administratrix and from said executrix the respective shares of their decedents, but that

such pretended purchase was not made at any duly notified meeting of the stockholders; that without the share of said Mary L. Ruggles being represented in said meeting there was no quorum of the members of the corporation present competent to transact any such business; that said corporation had no power or authority to purchase any part of the capital stock of said corporation; that inasmuch as said Pernissa Gyles, as executrix and sole legatee of said Gyles, and said Mary L. Ruggles, as administratrix and widow of said Nathaniel S. Ruggles, who received large personal estates in her own right from her husband, were liable to contribute equally with this respondent from the estate of his intestate, they ought to have been made parties defendant to this bill. He admitted that his intestate owned one share of the capital stock of said corporation, but that the estate of his intestate was only liable for such proportion of the corporate debts as said one share bore to the whole capital stock, and that for such proportion of said indebtedness said estate was only liable after deducting the other debts due from his intestate and the expenses incidental to the settlement of the estate. Finch answered also, setting up the non-joinder of Mrs. Ruggles and Mrs. Gyles. The answer of Simmons to this bill was in the same words as his answer to the first bill. Accompanying the bills was an unsigned statement of facts in the handwriting of one of the counsel for the defendants. Accompanying this was another statement in the handwriting of one of the counsel for the complainants. This latter is the statement mentioned and quoted in the opinion.

Bradley, for the complainants.

Sheffield and William H. Potter, for the respondents, excepting James F. Simmons.

Currey, for James F. Simmons.

By Court, AMES, C. J. The main question in these cases, upon which nearly all other questions raised in them turn, relates to the nature and extent of the personal liability for the corporate debts imposed by the charter of the Newport Steam Factory upon its stockholders. This liability is claimed by the defendant stockholders to be several, not joint; to be secondary, in the sense of a mere guaranty that the capital stock, to the amount of some forty-five thousand dollars or forty-eight thousand dollars, shall be forthcoming, if needed, to the

creditors of the corporation; and to be limited, as against each stockholder, to the amount of capital stock by him held, after deducting therefrom any debt which may be due to him by the corporation; and that a judgment or decree, even for this sum, cannot be rendered or entered up against him until all the corporate property has been first exhausted.

We cannot agree to the soundness of this claim, or to the reasoning by which it is attempted to be supported.

The charter of this corporation, as it was originally granted, not only made the stockholders, who were such at the time when the contract was made or liability incurred, liable in their persons and estates therefor, in case no corporate property could be found to satisfy an execution issued to enforce the contract or liability against the corporation, but gave to the creditor the election to proceed, in the first instance, against such stockholders, precisely as if they had been mere copartners under the corporate name. It was only this right to proceed against the stockholders in the first instance, of which they complained to the general assembly, in 1840, as unusual and inconvenient, and of which, in effect, they procured the repeal. By the express terms of the act in amendment, if there should be no property upon which to levy an execution issued against the corporation, the stockholders designated in the act were still to be "liable in their own persons and estates, as if the contract had been made or liability incurred by them personally." Language can hardly be conceived more plainly imposing an unrestricted personal liability, both by force of the words "in their own persons and estates," and of the remaining words of the sentence, "as if the contract had been made or liability incurred by them personally." Notwithstanding the minute criticism which has been addressed to us upon the construction of this clause of the charter, we must hold the plain sense of the words "as if," in it, to be "in the same manner and to the same intent," that is, "just as if" the corporators, instead of the corporation, had contracted the debt.

That such a liability is made conditional upon want of corporate property upon which to levy in no way conflicts with this extent of liability when the specified occasion for its enforcement shall arise. So far from it, upon this construction, the stockholders are left precisely where their petition for the amendment request that they shall be—relieved from the "great inconvenience" of being proceeded against for the cor-

porate debts, in the first instance, whilst, for the payment of such debts, the security of the public is undiminished.

The attempt to imply from the amount in which the corporation is authorized by the charter to assess its stockholders, a limit of their liability to that amount for the corporate debts, confounds the domestic relations of the corporation, which concern only its members, with the remedies of its creditors, which concern the public. The argument is all the other way; since the less the corporate power to assess for the payment of debts, the greater the necessity of effectual remedies against the corporators for their collection.

Besides, the ninth section of the charter, which was retained as a necessary part of it, notwithstanding the amendment, is utterly at war with the restricted liability contended for by the defendants. This section gives to any stockholder whose property shall be sold for the payment of a debt of the corporation, or who shall be compelled to pay such debt, or any greater proportion thereof than is due to his stock, an action against the corporation to recover the amount so paid, and against the stockholders to recover the amount paid by him over and above his just proportion. According to the argument of the defendants, the occasion thus provided for can never arise; since no stockholder, by their construction of the charter, can be subjected at the suit of a creditor of the corporation to more than his just proportion of a corporate debt.

It is true that the common law visits no personal liability upon the members of a corporation aggregate for its contracts; but for this very reason the policy of this and other states and countries of the common law has, by express enactment, imposed such a liability in some form upon stockholders in incorporated trading and manufacturing companies, in order that the public may be secured against the consequences of the extravagant speculations, or even of the incautious enterprises of such bodies corporate. We may lament the private calamity which, in particular instances, has grown out of this policy; but because we do so, have no right to pervert the clear sense of a positive enactment designed to carry it out; and if we had, should only turn from some the ruin which we should thereby bring upon others.

The same language of the charter which describes the extent, ascertains also, when construed in reference to its subject, the character of the liability thus imposed. "The stockholders who were such at the time the contract was made or liability

incurred shall be liable in their persons and estates as if the contract had been made or liability incurred by them personally," is certainly language which imports a joint liability in the nature of that of copartners; and when it is recollected that the liability spoken of is for debts contracted in a business carried on by all, for the profit of all, we cannot doubt but that this was the species of liability intended. To carry the analogy to copartnership still further by the concluding clause of the section, the stockholders are to be holden, not only for all debts incurred up to the time of the sale and disposition of their stock, but until public notice of such sale or disposition is given in some public newspaper printed in the place in which they transacted their business.

In the contingency, then, that a judgment creditor of the corporation can find no corporate property upon which to levy his execution, he is entitled to proceed against such stockholders as are liable for his debt, as joint contractors or copartners. So far as living stockholders are concerned, his complete and appropriate remedy against them is at law, as against other copartners; his declaration stating, of course, the want of corporate property which entitles him to proceed against the stockholders liable to him in that character.

On the other hand, in case of the death of one or more joint contractors or copartners, the liability at law remains only against the survivors; and so a creditor of this corporation, if he would pursue the estates of deceased stockholders, can only do so in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, construes it to be several as well as joint. It is true that the law expresses, in the act of incorporation, the form of the liability of the stockholders, as well as imposes it upon them; but the same law also provides, looking to the remedy, that the stockholders shall be liable in a certain contingency for a corporate debt in the same manner as if they had personally contracted it, and thus expressly subjects the form of the liability to the ordinary equitable correction.

As the law has been settled by the leading case of *Devaynes v. Noble*, 1 Meriv. 529, S. C., 2 Russ. & M. 495, a creditor of the firm may pursue the estate of a deceased copartner, and so here, a creditor of the corporation, the estate of a deceased stockholder liable to his debt for payment out of the same, without reference to the state of accounts between the copartners or stockholders and the firm or corporation, or to their

solvency or insolvency; leaving the estate to seek repayment from the firm or corporation, or contribution from those liable to it. A mere equity, however, which is all that a creditor of the firm or corporation has against the separate estate of the deceased copartner or stockholder, cannot compete with an equal equity united to the legal right of the separate creditors of the estate, to have their debts satisfied out of it; and hence, his right is only to the surplus of the separate estate after all its expenses and separate debts have been paid: *Gray v. Christwell*, 9 Ves. 118; *Arnold v. Hamer*, 1 Freem. Ch. 509; 2 Lead. Cas. Eq., Hare & Wallace's Notes, 317-321, and cases cited.

In case of the death of two or more of the stockholders liable, there seems to be no objection, on the ground of multifariousness, to seeking an account of and payment from their respective separate estates, in the same bill; or rather, the conveniences of such a joinder are deemed to overbalance the inconveniences of it: *Brown v. Weatherby*, 12 Sim. 6; *Wilkinson v. Henderson*, 1 Myl. & K. 582; but as two or more creditors for whose claims different sets of stockholders are liable, cannot unite them all in the same bill, for the purpose of separate relief against those respectively liable to them, *Judson v. Rosie Galena Co.*, 9 Paige, 598, 603 [38 Am. Dec. 569], so we apprehend that, for the same reason, the same creditor cannot enforce in the same bill, against the estates of deceased stockholders, different debts, for which all the estates pursued are not liable. Both at law and in equity, only those causes of action *ex contractu* can be joined in the same suit to which all the parties defendant were originally liable.

In pursuing the estate of a deceased stockholder for the payment of a corporate debt, it is obvious that all the living stockholders and representatives of the estates of deceased stockholders liable to it are interested in the account sought to be taken, and should be made parties to the bill: *Pierson v. Robinson*, 3 Swanst. 139, note; Story's Eq. Pl., secs. 166-168; whilst, on the other hand, the bill would be objectionable for the misjoinder of persons not interested in it, and as to them must be dismissed or amended. As we have no statute making the real estate of deceased persons personal assets for the payment of debts, but such estate, notwithstanding the insolvency of the deceased, descends to their heirs at law, if the real estate of a deceased stockholder is sought to be charged, his heirs in case of intestacy, and devisees if there be a will, must, as well as his personal representatives, be made parties to the bill.

For the sake of brevity, we have stated in this general form the rules which govern the joinder of parties and causes of action applicable to the suits submitted to us, and which easily resolve the various questions upon those points which have been or may be raised. One or two questions require, however, more particular attention.

It is objected by the defendants to the bill in which the New England Commercial Bank seek to enforce their debt, earliest in date, against the estates of Weaver, Ruggles, and Giles, that when the first portion of this debt was incurred, amounting to about forty-eight hundred dollars, George Hall, Edward King, and the firm of J. & P. Rhodes were stockholders, and should have been made parties defendant to the bill. As they are not in any form sought to be charged by the plaintiffs, and are not made parties to the bill, we shall notice only this objection of their non-joinder as defendants, upon the facts which have been stated to us as agreed in the case. In the portion of this statement which is in the handwriting of the counsel for the plaintiffs, it is said that on the third day of February, 1852, which was after these stockholders had sold their stock, and had probably given notice that they had thereby ceased to be stockholders, "the notes held by the bank were given up by the bank, and a new loan made by the bank to the Newport Steam Factory, and new notes for said loan were given to the bank, by reason that shortly prior to that time a change had been made in the ownership of some of the stock of the Newport Steam Factory; and intending at the time of said loan to make a new contract with the new stockholders. The notes given on said third day of February, 1852, are the notes upon which judgment has been obtained, and upon which this bill is filed."

If this is to be taken by us as a portion of the agreed statement of facts, it certainly disposes of the objection we are considering. The giving up by the plaintiffs of the old notes, and the taking of the new, after the retiring of these stockholders, and for the express purpose of their discharge, upon every principle, and by all the authorities, operates as a complete release of the stockholders from the debt: Collyer on Partnership, secs. 539-562, and cases cited.

The defense set up by the answer of Pernissa Gyles, executrix of Charles Gyles, late of Newport, to the account sought from her in that capacity of the personal estate of her husband and testator, seems to us to be a good one. The facts alleged

by her, and which are substantially admitted in the agreed statement, are, that on the tenth day of May, 1849, her said husband, then the holder of one share in the capital stock of the Newport Steam Factory, died, leaving a last will and testament, by which she was constituted his executrix and sole devisee and legatee; that his said will was duly proved, and letters testamentary were issued to her; and that subsequently, on the twenty-first day of July, 1849, she caused public notice of her appointment and qualification as his executrix to be published in the Newport Mercury, a newspaper printed and published in said Newport; that thereafter she went into possession, under said will, of all the estate, real and personal, of her said testator, and out of the same paid all his debts, funeral expenses, and expenses of settling his estate; and on the twenty-first day of April, 1851, settled with the court of probate of Newport her final account as such executrix; and that more than three years had elapsed subsequent to the publication, as aforesaid, of notice of her appointment and qualification as his executrix, before the filing of this bill. In the absence of fraud, which is not pretended in this case, the bar of the statute limiting suits against the personal representatives of deceased persons to three years after publication of notice of their appointment, is positive and without exception, and rests upon the policy of thus enabling the speedy settlement of the estates of the dead: R. S., c. 161, sec. 8; c. 177, sec. 9; *Pratt v. Northam*, 5 Mason, 95. It is equally applicable to suits in equity as to actions at law, and has been applied by this court as a bar to a bill brought against the administrator of a deceased shareholder in an insolvent bank to compel payment out of the estate of the intestate of his proportion of the corporate debts: *Atwood v. Rhode Island Agricultural Bank*, 2 R. I. 191. This, of course, leaves the question of Mrs. Gyles's liability, as herself a stockholder, by virtue of her husband's bequest to her of his share of the stock of the Newport Steam Factory, and her acceptance of the bequest, wholly unaffected.

How far the above defense availed of by Mrs. Gyles, in her administrative character, is available to Mrs. Mary L. Ruggles, as administratrix of her husband Nathaniel S. Ruggles, and how far the general statute of limitations will avail both Mrs. Ruggles and Mrs. Gyles, as successors to the real assets belonging to their respective husbands, we shall reserve, since Mrs. Ruggles has not come in and answered the bill, and no argument has been submitted to us upon these points. Both

bills will probably be found to require amendment as to parties, and in other respects; and if it shall prove necessary for the plaintiffs, in order to obtain satisfaction of their debts, to pursue the estates of deceased stockholders, full opportunity will thus be afforded for these and other questions to be raised and argued.

For the same reasons, we reserve the questions which have been incidentally raised concerning the validity and effect of the conveyances of their shares, both by Mrs. Gyles and Mrs. Ruggles, to the corporation; which, complicated with the length of time and other circumstances which have intervened since the conveyances were made, will demand distinct argument and consideration before they can properly be passed upon by the court.

It remains to be seen how far what we have decided affects, in their present position, the actions at law which have been submitted to us. In the first place, it is clear that as no legal liability for the corporate debts survives against the estates of deceased stockholders, the two actions brought by the New England Commercial Bank and by Josiah S. Munroe, respectively, against Seth W. Macy, as administrator of Joseph Weaver, and the action brought by said bank against Samuel Allen, as executor of Samuel Allen, deceased, cannot be maintained; and for the same reason, that the pleas that Seth W. Macy, in his said capacity, is not joined as a party defendant to the two actions brought by said Munroe against certain living stockholders of the corporation, must be overruled. In the second place, that as the stockholders who were such at the time of the contracting of a debt are, for want of corporate property to be levied on therefor, liable for the debt as joint contractors, in the nature of copartners, this liability may be enforced against such living stockholders, and is, as against other copartners, most appropriately enforceable against them, by action at law, rather than by a proceeding in equity; and that to defeat this right of action, it is not sufficient that the corporation should have property, in trust or otherwise, not open to seizure or levy upon execution, but that it should have property in such a condition that the execution, which must have been first obtained by the creditor, might have been levied thereon. This, in effect, disposes of the remaining special pleas filed in the last-named actions at law, and leaves them for trial upon the general issue. As to the two remaining actions at law, brought by the New England Commercial Bank

against certain stockholders of the Newport Steam Factory, and in which the writs and declarations are missing, the actions must be dismissed, unless these are found, or their loss, in some form, be supplied.

LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATION: See *Corning v. McCullough*, 49 Am. Dec. 287, note 308, where this subject is discussed; *Freeland v. McCullough*, 43 Id. 685, note 694, where the subject is more fully considered.

HOFFMAN v. ANTHONY.

[6 RHODE ISLAND, 282.]

NOTICE OF MORTGAGEE'S SALE UNDER POWER IN MORTGAGE IS FATALLY DEFECTIVE when it is not signed by any one, gives neither the name of the mortgagor nor that of the mortgagee, does not give correctly the number of the page in the volume of the records in which the mortgage is recorded, and does not name the auctioneer who is employed to conduct the sale; and notwithstanding a sale under such a notice, a court of equity will decree that the mortgage has not been foreclosed, and permit the mortgagor to redeem.

OBJECT OF NOTICE OF SALE UNDER POWER IN MORTGAGE IS TO SECURE ATTENDANCE of purchasers and to obtain a fair price for the property mortgaged, and it is the duty of the mortgagee to see that such notice is given as will reasonably accomplish the end designed.

BILL in equity to redeem two lots of land in Cranston. The facts are sufficiently stated in the opinion.

James Tillinghast, for the complainant.

Thurston and Ripley, for the respondents.

By Court, BRAYTON, J. The plaintiff in this bill claims the right to redeem the premises described therein from the mortgage execution by James Reynolds and Thomas Parker, on the thirteenth day of December, 1852, to Henry Blundell, which mortgage, the bill charges, came to the defendant Thomas E. Anthony by various mesne assignments, and that the said mortgage is still a subsisting mortgage upon the estates. The bill, anticipating the defense to be set up to his claim for redemption, that the mortgage had been foreclosed by sale under the power contained in the mortgage, and to show that the power had not been executed, at least so executed as legally to vest the estate in the purchaser to whom it was struck off at the auction sale, sets out, among other grounds of objection to the validity of the sale made by the said Anthony, the assignee

of the mortgage, that the advertisement, caused to be published by the said Anthony in the public newspaper, is not signed, and does not contain the name of any party connected with the mortgage; and charges that the reference in said notice to the place where said mortgage is recorded is not correct, the mortgage not being there recorded. The answer admits that this was the notice given, and that it was erroneous in the particulars charged; that although it stated that the mortgage was recorded at page 25 of book No. 27, in Cranston, it was not there recorded, but was recorded on page 325 of that book. Now, the plaintiff claims that such a notice as here appears to have been given is not sufficient to warrant a sale; that it is not a fair compliance with the condition imposed upon the power of sale, to give thirty days' public notice.

The power in this case was by the mortgagor vested in the mortgagee, if the mortgagor should make default in payment at the times appointed, to sell the estate, or so much as might be necessary to discharge the debt upon condition, but that he should give public notice of such sale for thirty days. This power is annexed to the estate of the mortgagee; and every assignee, by virtue of the assignment to him thereof, is clothed with this power, and upon the like condition of notice. The mortgagee, so long as he held the estate in mortgage, and every successive assignee while he held it became a trustee, therefore, with a power to sell and appropriate to himself so much only as might be necessary to discharge the debt due from the mortgagor. He was to sell no more than might be reasonably necessary to discharge the debt. If he sold more from any necessity, he was to hold the balance above the mortgage debt for the mortgagor, and if any assets remained unsold, it remained to the mortgagor.

The mortgagor did not require, and had not provided that before making sale of the estate or any part thereof, any notice should be given to him of such intended sale. The only notice provided for was that by advertisement in a public newspaper, and which was intended to invite purchasers. This was its great and only purpose; and as the mortgagor had provided no notice to himself upon which he could give a wider circulation to the advertisement, was of the utmost importance to him. He had a deep interest in having such notice given as would be likely to attract purchasers who would be willing to give a fair price for the estate. This being the purpose of the notice, it imposed a duty upon the assignee to see that the notice was

given, such as would reasonably accomplish the end designed. This duty is expressed by the chancellor in the case of *Matthis v. Edwards*, 2 Coll. Ch. 465, S. C., 33 Eng. Ch. 465, in reference to a notice under a like power, in this language: "A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is bound to exercise some discretion not to throw away the property, but to act in a business-like manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances attainable."

The same view, as to the duty of the mortgagee in giving notice, is expressed in *Burnet v. Denniston*, 5 Johns. Ch. 35; *Longwith v. Butler*, 8 Gilm. 32. This duty, as it seems to us, is not performed by the notice published in the present case. The advertisement professes to give notice that at a certain time and place these lots of land, which are sufficiently described to inform purchasers what is proposed to be sold, will be sold by somebody under a certain power which may be found in the records of Cranston in a certain place there. This reference to the records is the only source pointed out by the notice of any information as to the terms of the power, or of the conditions upon which it might be exercised; and when an inquirer goes there, no such record and no such information is to be found. Whether there is any such power, he has no means to ascertain. It is not even stated who made the mortgage or to whom it was made. Had this been stated, he might have found the deed somewhere on the records; but without it he is only to search for a mortgage of lots 117, etc., made by somebody. The record in fact utterly fails to furnish him with any information. He proposes to inquire of the person who advertises the sale. But who is he? The notice does not state this. He cannot inquire of the mortgagor or of the mortgagee, for he has no notice who they are. As a last resort, it might occur to him to inquire of the auctioneer, but on looking at the advertisement, he finds that it is not disclosed who is to conduct the auction sale. All that he can know is, that certain lots of land which he can view are proposed to be sold by somebody not named, under a power from some other person not named. Whether there exists any such power, or whether the contingency has arisen upon which it is to be exercised, or what the contingency is, he cannot know from any source of information given him. He has no means to forr

an opinion even whether anything could be sold, and whether it would be worth his while to attend at the time and place notified. Few purchasers, probably, would think it was. Being pointed to the records for the terms of the power, they should have the means of examining, as they would desire to do, before bidding.

It is no matter of wonder that with such a notice as this no other persons attended this sale—as the evidence shows they did not—than such as derived their information from other sources than this advertisement—none but such as were specially invited to attend, viz., the auctioneer, the holder of the mortgage, one of the original mortgagors having then no title, and one other person specially requested to bid for the defendant, Rebecca Anthony. Nor is it strange that the estate should, under the circumstances, have been struck off for one third of its fair value. Such a notice would be likely to produce such a result, or at least was not adapted to produce any other. In giving such notice, it cannot with propriety be said that the assignee, in the exercise of the power and trust with which he was clothed, acted in a business-like manner with a view to obtain as large a price as might reasonably be obtained under the circumstances with due diligence and attention on his part, or in common fairness towards his *cestui que trust*.

It must be declared that the plaintiff is in this case entitled to redeem, that the said mortgage is not foreclosed, and the case must be referred to a master to ascertain the amount due upon the mortgage.

NOTICE OF SALE, WHAT IS PROPER AND SUFFICIENT.—The object of a notice of sale is to inform the public of the nature and condition of the property to be sold, and of the time, place, and terms of the sale. Notices are given for the purpose of securing bidders, and to prevent a sacrifice of the property: Freeman on Executions, sec. 285. If these objects are attained, immaterial errors and mistakes will not affect the sufficiency of the notice. But courts guard with jealous care the rights and interests of persons whose property is sold under their process, or by their order. If, therefore, any mistakes or omissions occur in notices of sale, which are calculated to deter or mislead bidders, or to depreciate the value of the property, or to prevent it from bringing a fair price, such mistakes or omissions will be fatal to the validity of the notice, and also to that of the sale made pursuant thereto. Questions as to the sufficiency of notices of sale most frequently arise in the case of sales under execution, probate sales, and sales under mortgages with power to sell. In the case of sales made under mortgages containing a power to sell upon breach of condition, it is held that a notice of sale which complies with the requirements of the power authorising the sale is sufficient: 2 Jones on Mortgages, sec. 1854; *Kennedy v. Dunn*, 58 Cal. 339; *Bush v. Sherman*, 80 Ill. 169;

Crocker v. Roberson, 8 Iowa, 404; *Ormsby v. Tarascon*, 3 Litt. 405, 411; *Johnson v. Dorsey*, 7 Gill, 269, 286; *Model Lodging-house Association v. City of Boston*, 114 Mass. 133; *Martin v. Paxon*, 66 Mo. 260.

DESCRIPTION OF PROPERTY IN NOTICE.—The notice of sale ought to contain such a description of the property to be sold as will enable intending purchasers, in the exercise of ordinary diligence, to indentify it. A sheriff's notice of sale should give as full and complete a description of the property as it is possible for him to give, in the exercise of ordinary diligence for that purpose, in view of the character, condition, and location of the property: *Collier v. Vason*, 12 Ga. 440; S. C., 58 Am. Dec. 481; *Sheffield v. Key*, 14 Ga. 528; *Freeman on Executions*, sec. 235. In the case of *Collier v. Vason*, *supra*, it was decided that the question whether the words "eight city lots in the city of Albany, numbers not recollected, but known in said city by the name of Joseph B. Shore's property," was a sufficient description, or not, was one for the jury. It is not necessary, in a notice of sale at public auction, to give a minute description of its exact location by metes and bounds; any description which informs the public of the property to be sold is sufficient. It is sufficient if it enables the public to understand, by the exercise of ordinary intelligence, what property is offered for sale, and to identify the same by examination, if a more particular knowledge is desired: *Stevens v. Bond*, 44 Md. 506.

A sheriff's notice of sale which sufficiently identifies the property to be sold is all that the law requires: *Allen v. Cole*, 9 N. J. Eq. 286; S. C., 59 Am. Dec. 416. In *Pomeroy v. Winskip*, 12 Mass. 513, S. C., 7 Am. Dec. 91, it was decided that in the sheriff's notice of the sale of the equity of redemption a general description of the property is sufficient. A foreclosure notice which states that the premises will be sold, "or so much thereof as may be necessary," is in the usual and proper form, and is not objectionable, as not designating the precise parcels to be sold: *Snyder v. Hemmingway*, 47 Mich. 549. In a notice of sale under a mortgage, it is generally sufficient if the premises are described in the notice as they are described in the mortgage: *Model Lodging-house Association v. City of Boston*, 114 Mass. 133; *Robinson v. Ma-teur Association*, 14 S. C. 148. And that, though the street number of the building has been changed since the making of the mortgage, when it appears that the mortgagee did not know of the change: *Model Lodging-house Association v. City of Boston*, *supra*. In *Jackson v. Harris*, 3 Cow. 241, it was held that an advertisement of the sale of mortgaged premises, under the New York act of 1808, authorizing the loaning of moneys to citizens of that state, passed April 11, 1808, was sufficiently particular in its description of the premises, if it contained the name of the mortgagor, the date and number of the mortgage, the number of the lot in which the premises lay, the town in which the lot was situated, when the mortgage was made, and the number of acres mortgaged, without describing it by metes and bounds. In the case of *Newman v. Jackson*, 12 Wheat. 570, 572, Mr. Justice Trimble, delivering the opinion of the court, referring to a notice of sale under a deed of trust, said: "The law has prescribed no particular form for a notice of this description. It is sufficient if, upon the whole matter, it appears calculated reasonably to apprise the public of the property intended to be sold." In that case, the notice of sale described the lot of land to be sold as "lot No. 99, in Peter, Beatty, Threlkeld, and Deakin's addition to Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street." The property was in fact lot No. 99, in Threlkeld's addition, but the location on the streets named was correct. It was held that this mistake did not vitiate the notice. A con-

stable seized corn standing on S. E. N. W. sec. 8, T. 23, R. 6. He posted three notices of the sale, in one of which the land was described as the S. E. N. E. sec. 8. The other two were correct. It was held that this mistake did not vitiate the sale: *Pollard v. King*, 63 Ill. 36. But a notice of sale which described the land to be sold as the north half (N. ½) of the south-west quarter (S. E. ¼) of said section, when the land in fact was the north half of the south-east quarter of the section, was held to be defective in *Helmer v. Rehm*, 14 Neb. 219. So a notice of sale which describes a tract of land as containing six hundred and forty arpents, when it in fact contains six hundred and forty acres, is invalid: *Wright v. Roussel*, 5 La. Ann. 126.

DESCRIPTION BY REFERENCE TO RECORD.—A notice of sale under a mortgage, which gives to the public the means of ascertaining the facts required to be stated therein by an accurate reference to the record of the mortgage in the clerk's office, is sufficient: *Candee v. Burke*, 1 Hun, 546. And if it gives the date of such record correctly, it will be sufficient, although the number of the book in which it is recorded is erroneously stated: *Judd v. O'Brien*, 21 N. Y. 187. But a notice of foreclosure sale which does not state when the mortgage was recorded is insufficient, although it does state in what office and book and at what page it is recorded: *Martin v. Baldwin*, 30 Minn. 537. A notice of sale is sufficient which describes the premises as they are described in the mortgage, and refers to the book and page of the registry of deeds where it is recorded, and by book and page to a plan in the office of the superintendent of public lands: *Stickney v. Evans*, 127 Mass. 202. A notice of sale is sufficient, although the premises to be sold are described in it no more particularly than as "situated in the northerly part of the city of Providence, being the lot of land No. 10 (ten) on the plat of the land of S. W., surveyed and platted by H. F. W., July 7, 1845," where the plat is recorded: *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; S. C., *ante*, p. 681. But a notice which does not name the person from or the person to whom the deed of trust was, under which the sale was to be made, but merely refers to the book of the land records, without describing the location of the lands, except that they are in a certain county, is not sufficient: *Reeside v. Peter*, 33 Md. 120. In a notice of sale of land under an execution, the county in which the land is situated need not be mentioned, where the description is otherwise sufficient to identify it: *Duncan v. Mutney*, 29 Mo. 368. A notice of sale under a mortgage, which describes a tract of land containing four acres more than the tract mortgaged, is defective and insufficient, although the tract to be sold is contained in the tract advertised: *Fesner v. Tucker*, 6 R. I. 551. Bosworth, J., in delivering the opinion of the court in that case, said: "Sales under mortgages with power to sell are regarded by courts with a jealous care. They furnish a very summary mode of obtaining payment of a mortgage debt, and of foreclosing an equity of redemption, and should therefore be conducted with perfect fairness, in order that the mortgagor's rights, or those of his assignees who may have purchased his equity for valuable consideration, may not be sacrificed. If, therefore, the power of sale conferred by the mortgage is not strictly and fairly pursued; if the execution of the power is tainted with fraud; or if any mistake is made in conducting the sale, adapted to mislead those who might desire to purchase, so that the sale, if at auction, occurs under circumstances calculated to depreciate the value of the property sold, or prevent it from bringing a fair auction price—the sale will be held invalid. The sale authorized in the power annexed to this mortgage was to be made after advertising the premises for the space of thirty days prior to the sale. A sale without this notice would certainly be void. It was incumbent, therefore, on the mortgagee to give this

notice. In giving it, he must advertise the premises to be sold, and give the public notice of the time and place of sale. If the premises are not truly described, it cannot be truly said that the premises are advertised; if the time and place of sale are not made reasonably certain, it cannot be said that public notice of the sale is given. In both respects adverted to the notice given of this sale is defective and insufficient. The tract advertised was a tract of land containing four acres more than the tract embraced in the mortgage. Although the tract sold was contained in the tract advertised, yet the tract advertised was not the tract to be sold. Persons who might desire to purchase the quantity of land embraced in the mortgage might not want to buy the tract advertised to be sold, and therefore might not attend the sale."

TIME OF SALE SHOULD BE STATED in the notice. A mistake in giving the date of the sale will be fatal to the validity of the notice, if the mistake is of such a character as to make the notice in that respect ambiguous, or to mislead the public. Thus a mistake in the notice of sale of land under a power in a mortgage will be fatal to the validity of the sale, where in the advertisement a sale is advertised to be made in one year, which was designed to be made, and was actually made, in the succeeding year: *Fenner v. Tucker*, 6 R. I. 551. Bosworth, J., in delivering the opinion of the court in that case, said: "The notice given bore date January 21, 1858, and the sale was appointed to take place on February 12th. Now, although this notice was published in a paper issued in January, 1859, it was not proper notice of a sale to take place in February, 1859. At least, it might mislead the public as to the time of sale. Being dated January, 1858, it would naturally point to the succeeding month of February; and those who read it would naturally suppose it an advertisement of a sale of the past year, continued inadvertently, or published by mistake." But if the mistake as to the date of the sale is not of such a character as to mislead the public, it will not affect the sufficiency of the notice. Where a notice of sale was by mistake dated April 23, 1858, instead of 1868, the court held that the mistake was obvious on inspection, and did not invalidate the sale: *Mowry v. Sanborn*, 68 N. Y. 153. A notice of sale dated September 15, 1861, stated that the sale would take place on the sixth of December, "1871." It was held that this mistake could not mislead, and did not, therefore, affect the validity of the notice: *Jensen v. Weinlander*, 25 Wis. 477. A notice of sale published on the seventh of December stated that the sale would take place "on the twenty-eighth day of December next." This notice was declared to be valid, the court saying that it could not be considered to mean that the sale was to take place in a year and twenty days instead of in twenty days from its date: *Gray v. Shaw*, 14 Mo. 341. It is not sufficient ground for setting aside a sale that the advertisement stated the wrong day of the week, where the day of the month was given correctly, and there is no evidence that any fraud was intended, and no proof that any one was misled by the mistake: *Chandler v. Cook*, 2 McArthur, 176. A notice of sale given by advertisement need not be dated. Where such notice is without date, the date of its first publication will be taken as its date: *Ramsey v. Merriam*, 6 Minn. 168.

HOURLY OF SALE.—It seems that it is not necessary to state in a notice of sale the precise hour of the day at which the sale will be held, provided the hours between which it is to take place belong to the business hours of the day. Thus in *Cox v. Halsted*, 2 N. J. Eq. 311, it was held that a notice which stated that the sale would be held "between the hours of twelve and five o'clock in the afternoon" was good. And in *Burr v. Borden*, 61 Ill. 388, it was decided that a notice of sale under a mortgage which announced that the

sale would be held on the first of March, 1860, "between the hours of nine A. M. and four P. M.," was sufficient. Lawrence, C. J., delivering the opinion of the court in that case, said: "The objection taken to the advertisement is, that it was not sufficiently specific as to the time of the sale. It announced it to be held on the first of March, 1860, between the hours of nine A. M. and four P. M. This mode of advertising sales has always been regarded in this state as sufficient, if the hours named belong to the business portion of the day, as they did in the present instance. Persons who see the advertisement and desire to attend the sale can easily ascertain the hour by inquiring of the parties about to make the sale. If unwilling to wait at the appointed place, and if deceived by them and prevented from making a desired bid, the sale might be set aside. To require the advertisement to name the precise hour would lead to much practical inconvenience, and often necessitate a postponement of the sale. It is sometimes very desirable for the interests of the debtor to delay a sale for two or three hours, in order to await the arrival of persons expected to bid, or in consequence of a storm or some other unforeseen emergency. Moreover, if a particular hour were named in all cases, the question whether the sale had been held at the hour named would be a fruitful source of litigation. The mode adopted in this case has been so generally in use as the most convenient mode, and has been so free from any evil consequence, that we are not inclined to hold an advertisement in this form to be, of itself, a sufficient reason for setting aside a sale, the hours named being within the ordinary business hours of the day." But if the notice does not name the exact hour at which the sale is to be held, it ought to name the hours between which it will take place, which hours must be in the business portion of the day. A notice that a sale will be made "on the second day of January next" is insufficient: *Trustees of Schools v. Snell*, 19 Ill. 156; S. C., 68 Am. Dec. 586; but see *Thornworth v. Armstrong*, 20 Minn. 453.

WHERE NOTICE IS REQUIRED TO BE GIVEN FOR CERTAIN NUMBER OF WEEKS SUCCESSIVELY, there is a difference of judicial opinion as to whether or not seven days must be given as a week's notice. In Illinois, Iowa, and New York it has been decided that a notice required to be published for a given number of weeks successively is sufficient if it is published once in each week for that number of weeks, although the number of days from the first publication to the day of sale is not equal to the number of days in that number of weeks: *Garrett v. Moss*, 20 Ill. 554; *Pearson v. Bradley*, 48 Id. 250; *Morrow v. Weed*, 4 Iowa, 77; S. C., 66 Am. Dec. 122; *Howard v. Hatch*, 29 Barb. 297; *Wood v. Terry*, 4 Lans. 80; *Chamberlain v. Dempsey*, 22 How. Pr. 356; S. C., 13 Abb. Pr. 421; *Olcott v. Robinson*, 21 N. Y. 150; *Wood v. Morehouse*, 45 Id. 368. But other authorities hold that a publication for a certain number of weeks must be made for as many days before the day of sale as there are days in the number of weeks required: *Boyd v. McFarlin*, 58 Ga. 208; *Meredith v. Chancey*, 59 Ind. 466; *Francis v. Norris*, 2 Miles, 150; *In re Wallace's Estate*, 2 Pittsb. 145; *In re North Whitehall Township*, 47 Pa. St. 156; *Early v. Doe*, 16 How. 610. But see *Morrow v. Weed*, 66 Am. Dec. 131, where it is claimed that *Early v. Doe*, *supra*, is an authority the other way. In *Worley v. Naylor*, 6 Minn. 192, it was held that a notice published for the first time on the thirtieth of August, and successively once a week up to and including the fourteenth of September, the day of sale, was held to be sufficient under the Minnesota statute. In South Carolina it is held that in computing time the first day of publication and the day of sale may both be included if that be necessary to support a deed: *Freeman on Executions*, sec. 285; *Manning v. Doss*, 10 Rich. L. 395; *Williamson v. Farson*, 1 Bail. L. 611; S. C., 21 Am.

Dec. 492. In Kansas a notice of sale under execution, or order of sale, must be published in a newspaper at least thirty days prior to the day of sale, and be continued in each successive issue of the paper up to the day of sale: *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beach*, 12 Id. 492. But an advertisement in a weekly newspaper is sufficient, provided the first publication is at least thirty days before the sale, and is continued in each successive number of the paper up to the day of sale: *Trepton v. Buse*, 10 Id. 170. Where notice for thirty days in a daily newspaper is required to be given, thirty days must intervene between the first publication and the day of sale: *Smith v. Rowles*, 85 Ind. 264; *German Bank v. Stumpf*, 73 Mo. 311; *Eric S. F. & R. A. v. Thompson*, 13 Phila. 511. If the first insertion of a notice in a newspaper is not less than ten days before the sale, it is a sufficient notice for ten days. It is not necessary that ten days shall intervene between the last publication and the day of sale: *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556. Where ten days' notice of a sale is required, and the sale is to be held on the thirteenth day of a certain month, a notice first published on the first of the month, and continued thereafter on each day, except Sundays, for nine insertions, is sufficient: *Cushman v. Stone*, 69 Id. 516. But where thirty days' notice is required, a notice published for the first time in a weekly paper on the second day of the month and the last on the twenty-eighth of the same month, is not sufficient: *Enochs v. Miller*, 60 Miss. 19. A notice that gives a day or two more than is required is not bad on that account: *Teels v. Newsom*, 75 Ill. 215. And where a notice is required to be published for thirty days before the day of sale, in a weekly newspaper, it is no objection to the notice that the first number of the paper containing the notice was printed and published in advance of the day of the week on which the publication was usually made: *Wilson v. Scott*, 29 Ohio St. 636. Where a deed of trust requires thirty days' notice of the sale to be given by publication once a week for four successive weeks, a notice published the first time a few days more than thirty days prior to the sale, and continued in three other issues of the paper, weekly, is a substantial compliance with the power: *Taylor v. Reid*, 103 Ill. 349.

WHERE NO PAPER IS ISSUED ON CERTAIN DAYS INTERVENING between the first and the last day of publication, this circumstance will not render the notice insufficient: *Weld v. Rees*, 48 Ill. 428; *Kellogg v. Carrico*, 47 Mo. 157; *German Bank v. Stumpf*, 6 Mo. App. 17. The law does not contemplate that notices of sale shall be inspected on Sunday, and therefore a notice posted on the post-office door, which could be seen six days out of seven, is sufficient: *Graham v. Fitts*, 53 Miss. 307. Notice of a sale on an impossible day is bad; as where the notice states that the sale will take place on Wednesday, February 19, 1874, instead of Thursday, February 19, 1874: *Thacker v. Tracy*, 8 Mo. App. 315.

PLACE OF SALE.—It is necessary that a notice of sale should specify the place as well as the time of the sale: *Hinson v. Hinson*, 5 Sneed, 322; *Richards v. Meeks*, 11 Humph. 455; *Burnet v. Denniston*, 5 Johns. Ch. 35. And a notice which contains neither the time nor the place is insufficient: *Blodgett v. Hitt*, 29 Wis. 169. Said Gilfillan, C. J., delivering the opinion of the court in *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125, 126: "The designation of a place of sale is an essential requisite of the notice, without which it is in law no notice whatever." In that case it was held that a notice of a mortgage sale which specified as the place of sale "the front door of the court-house" in a certain village, when in fact there was no house in the village known as the court-house, was void. In *Golcher v. Briebs*, 20 Id. 453, the court, al-

though saying that the designation of the place of sale as "at the court-house in the city of St. Paul" was more indefinite than it ought to be, yet upheld the validity of the notice in the absence of proof of fraud or unfairness, or of actual or probable injury. In *Beattie v. Butler*, 21 Mo. 313, S. C., 64 Am. Dec. 224, it was held that a notice which described the place of sale as "in the town of St. Joseph" was not too indefinite in that respect, the town containing only about five hundred inhabitants, and almost all the business being done in two blocks, where the property was sold on the premises which adjoined these blocks. It seems that by common usage in the city of New York all judicial sales are made in the rotunda of the city hall proper. Were it not for this usage, a notice of sale which describes the place of sale as "at the city hall" would be too indefinite, as all the buildings within the park, used for holding courts, are by law deemed parts of the city hall. But as it is, such a description is not too vague: *Hornby v. Cramer*, 12 How. Pr. 490. In *Powers v. Knockhoff*, 41 Mo. 425, it was held that a notice that the sale would take place at the court-house door in the town of Hillsboro, but omitting the name of the county, was sufficient. Where a mortgage provided that in case of a sale under it a notice thereof should be given, and that the sale should be made "at the north door of the court-house in said city of Chicago," it was held that these words are not restricted to the site of the court-house in existence at the date of the instrument, but that in case of its destruction by fire, a notice might be given naming the door of the building that might, at the time, be used as a court-house: *Waller v. Arnold*, 71 Ill. 350; *Gregory v. Clarke*, 75 Id. 350; *Alden v. Goldie*, 82 Id. 581; *Wilhelm v. Schmidt*, 84 Id. 183; *Chandler v. White*, Id. 435. After the south part of Malden was incorporated as the town of Everett, a person mortgaged land situated therein, describing it as situated in the south part of Malden; after condition broken, the mortgagee published a notice of sale to be made "in said Malden," and the notice was held to be sufficient: *Colcord v. Bettinson*, 131 Mass. 233.

TERMS OF SALE, as well as the names of the parties and a description of the property, must be given in the notice: *Farr v. Sims*, Rich. Eq. Cas. 122; S. C., 24 Am. Dec. 396, 401.

AUTHORITY TO FIX TIME, PLACE, AND TERMS OF SALE under a mortgage is in effect given to the mortgagee by a mortgage which provides that he shall advertise the time, place, and terms in a prescribed newspaper: *Calloway v. People's Bank*, 54 Ga. 441. So where a deed of trust provides that the notice of a sale made in execution of the power contained in it shall be published in a newspaper, without designating the name of the paper or the place where it is published, the trustee himself may select the paper.

BURDEN OF PROOF OF INSUFFICIENCY OF NOTICE OF SALE at auction of mortgaged property lies upon the party who alleges that sufficient notice of the time and place was not given: *Wilson v. Brannan*, 27 Cal. 278.

EFFECT OF OVERSTATING AMOUNT DUE, IN NOTICE OF SALE.—A notice of sale under a mortgage which, in good faith, slightly overstates the amount due on the mortgage is not, on that account, invalid: *Hamilton v. Lubetee*, 51 Ill. 415; *Fairman v. Peck*, 87 Id. 156; *Model Lodging-house Association v. City of Boston*, 114 Mass. 133; *Ramsey v. Merriam*, 6 Minn. 168. So where a mortgagee, through an honest mistake as to his legal rights, claims in his notice more than is due him, this will not render the notice invalid: *Klock v. Cronkhite*, 1 Hill (N. Y.), 107. In *Butterfield v. Farnham*, 19 Minn. 85, approved in *Menard v. Croce*, 20 Id. 448, it was held that, in the absence of fraud, claiming in the notice of sale more than is due on the mortgage does not vitiate the sale. In that case there was stated in the notice of sale an

excess of seven thousand three hundred and thirty-five dollars and sixty-four cents. But in *Spencer v. Annon*, 4 Id. 542, it was decided that a mortgagee cannot arbitrarily claim in his notice a sum which no legitimate calculation would justify; and that a notice which claims an amount which exceeds the correct sum by more than half is bad.

OMISSION TO STATE NAMES OF PARTIES TO SUIT under the decree in which the sale is made, in the absence of proof that by reason thereof competition in the purchase was prevented, or the sale in some way prejudiced, will not invalidate the notice or vitiate the sale: *Gibbs v. Cunningham*, 1 Md. Ch. 44. So a notice of sale under execution which fails to designate the defendants, or which names only one of them when there are several, is nevertheless sufficient: *Freeman on Executions*, sec. 235; *Perkins v. Spalding*, 2 Mich. 157; *Harrison v. Cachelin*, 35 Mo. 79. And where there are more judgments than one, and execution is levied upon the land of the defendant, one notice of sale is all that is required by the Tennessee statute: *Arnold v. Dinmore*, 3 Coldw. 235. Notices of two or more sales may be given by one advertisement: *Freeman on Executions*, sec. 235; *Southard v. Pope*, 9 B. Mon. 263; *Locke v. Coleman*, 4 Mon. 315. A notice of sale under a mortgage need not name those who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued: *Dyer v. Shurtleff*, 112 Mass. 165; S. C., 17 Am. Rep. 77; nor need it state the name of the assignee of the equity of redemption: *Learned v. Foster*, 117 Id. 365; nor is it necessary that it be signed by the mortgagee or his assignee: *Woonsocket Inst. Sav. v. American Worsted Co.*, 13 R. I. 255. It is not a material objection to a notice of a sheriff's sale that it is signed by a deputy sheriff: *Wallis v. Thomas*, 6 La. Ann. 76. A notice of sale by a sheriff or master in chancery need not be signed by the officer with his own proper signature. Whether it is so signed, or printed or signed by another, is immaterial: *Coxe v. Halsted*, 2 N. J. Eq. 311. The fact that some of the notices of an execution sale are signed by the title of "sheriff," instead of "late sheriff," does not affect the validity of the sale: *Van Gelder v. Van Gelder*, 26 Hun, 356. And a notice of sale addressed to a party interested in mortgaged premises as administratrix is sufficient, although the word "administratrix" is not added to her name: *George v. Arthur*, 2 Id. 406.

NOTICE NEED NOT STATE that the party subscribing it has lawful right and authority to foreclose: *People v. Prescott*, 3 Hun, 419. It need not specify that the mortgage will be foreclosed: *Leet v. McMasters*, 51 Barb. 236. It need not state for what breach of condition the sale is made: *King v. Bronson*, 122 Mass. 122; nor that there has been a default in the performance of the condition in the mortgage: *Model Lodging-house Association v. City of Boston*, 114 Id. 133. And it need not state the amount of the debt for which the property is to be sold: *Winwall v. Ross*, 4 Port. 321.

IMMATERIAL ERRORS OR MISTAKES IN NOTICE of sale will not affect its validity. Thus an erroneous statement in the notice of matters not required to be stated will not render it invalid: *Hubbell v. Sibley*, 5 Lana. 51, affirmed in 50 N. Y. 468. And where the names of the trustees are correctly printed in the body of the advertisement, a mistake in the name of one of them, at the bottom of the instrument, will not invalidate the notice: *Stephenson v. January*, 49 Mo. 465. But where an advertisement of sale of mortgaged premises falsely asserts that the premises are to be sold under three mortgages, when there are only two, and the public might be thereby misled or purchasers deterred from bidding, the sale will be declared void: *Burnet v. Deniston*, 5 Johns. Ch. 35.

FRAUD IN MANNER OF GIVING NOTICE will, of course, vitiate it. A notice of sale published in a remote part of the county, with the object of preventing its contents from coming to the knowledge of the owners of the equity of redemption, or of persons likely to bid at the sale, is void: *Jencks v. Alexander*, 11 Paige, 619.

MISCELLANEOUS.—A power of sale in a mortgage, which authorizes the mortgagee to sell the mortgaged premises, including the equity of redemption in the mortgagor, does not authorize a sale of the equity of redemption separately; and a notice of sale which only states that the equity of redemption will be sold is invalid: *Fowle v. Merrill*, 10 Allen, 350. A notice of sale left by the officer at the last and usual place of residence of the debtor is not a sufficient compliance with the Massachusetts statute which requires that the officer shall give notice in writing of the time and place of sale to the debtor, if found within his precinct: *Parker v. Abbott*, 130 Mass. 25. Posting a notice near the door of a certain hotel, where the deed giving the power to sell required it to be posted on the door, is not a sufficient compliance with the requirements of the power. And the refusal of the proprietor of the hotel to permit it to be posted on the door is not an excuse for not complying with the requirements of the power: *Sears v. Livermore*, 17 Iowa, 297.

WHAT IS SUFFICIENT PUBLICATION OF NOTICE IN NEWSPAPER.—An advertising sheet is not a newspaper, and a publication of a notice of sale in such a sheet is not a publication in a newspaper: *Tyler v. Bowen*, 1 Pittsb. 225; *Kraus's Appeal*, 21 Leg. Int. 4. In Indiana a publication of a sheriff's notice of sale in a Sunday newspaper is invalid: *Shaw v. Williams*, 87 Ind. 158; S. C., 44 Am. Rep. 756. A paper devoted to gathering and disseminating legal news, like the St. Louis Legal Record, is a newspaper in which notices of sale may be legally given: *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Id. 441. A sale under a decree of foreclosure will not be set aside because the notice of sale was not published in all the editions of the paper issued on the days on which the notice was published: *Everson v. Johnson*, 22 Hun, 115. Where a power of sale in a mortgage authorizes a sale upon ten days' notice in a newspaper of a certain city, no proof will be required of the notoriety or the extent of the circulation of the paper in which the notice is published, in order to sustain the sale: *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556. A notice of sale given by handbills in a county where there is a newspaper published is in law no notice at all: *Curd v. Lackland*, 49 Mo. 451. But where the defendant in execution owns the only newspaper published in the county where the execution is levied, and he refuses to permit the notice of sale to be published in his paper, although requested to do so, and tendered the usual and legal fee therefor, the sheriff may give notice of the sale by handbills: *Walton v. Harrie*, 73 Mo. 489.

NOTICE OF ADJOURNMENT OF SALE.—In *Griffin v. Marine Co. of Chicago*, 52 Ill. 130, it was decided that when a trustee adjourns a sale he must give a new notice for the same length of time required in the first instance. But in *Dexter v. Shepard*, 117 Mass. 480, it was held that the notice of the adjournment need not be as minute and specific as the original advertisement. Notice of the adjournment of a sale need not be made by publication in a newspaper, but may be given by proclamation at the time and place where the sale was to be held: *Allen v. Cole*, 59 Am. Dec. 416. A notice of sale which is defective for want of sufficient time is not cured by a postponement of the sale, on the day first appointed therefor, to one remote enough to satisfy the statute: *Sawyer v. Wilson*, 61 Me. 523. A notice adjourning a sale need not be published until the day of the sale, although it should be published

as soon as the necessity for the postponement arises: *Twiss v. Tracy*, 31 N. Y. 157. Where mortgaged premises were advertised, in pursuance of the statute, to be sold under a power of sale, and the mortgagee afterwards, and before the day of sale, assigned the mortgage to a third person, who continued the advertisement in the mortgagee's name instead of publishing it anew in his own name, it was held that the notice was insufficient and the sale void: *Niles v. Bangford*, 1 Mich. 338; S. C., 51 Am. Dec. 95. In *Dana v. Farrington*, 4 Minn. 433, the mortgagee gave notice that a foreclosure sale would be held on the twenty-third of May; he afterwards changed the day to the twenty-fifth of May. The mortgagor did not know of the change, and attended on the day originally set. It was held that the notice was invalid, and that the sale made pursuant thereto was irregular.

CASES AT LAW
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

STREET v. AUGUSTA INSURANCE AND BANKING Co.

[12 RICHARDSON'S LAW, 12.]

JUDGMENT IN REM OF COURT OF ADMIRALTY IS EVIDENCE AGAINST ALL PERSONS INTERESTED in the thing proceeded against.

LIBEL AND DECREE OF COURT OF ADMIRALTY IN PROCEEDING IN REM against a vessel insured, for damage done to another vessel by a collision, is evidence against the insurers of the collision, and of the negligence of the master and crew of the vessel insured, in an action on the policy for a loss occasioned by the negligence.

INSURERS ARE LIABLE FOR DAMAGE TO VESSEL INSURED THROUGH COLLISION, that being a peril within the policy, although the collision was caused by the negligence of the master and crew of the insured vessel.

INSURERS AGAINST COLLISIONS ARE NOT LIABLE FOR DAMAGES, COMPELLED TO BE PAID BY OWNERS OF INSURED VESSEL to the owners of another vessel, because of a collision through the negligence of the master and crew of the vessel insured.

ASSUMPSIT on a policy of insurance, by which the defendant insured the brig St. Andrew against "all dangers of the sea," and "all other perils, losses, and misfortunes." The declaration alleged that through the negligence of the master and crew of the St. Andrew, a collision occurred between her and the schooner Ellen Maria, by which the St. Andrew had suffered damage, and in consequence of which her owners, under a decree in admiralty, were compelled to pay the damage done to the Ellen Maria. A deposition of the agent of the plaintiffs in Boston showed the extent of the damage done to the St. Andrew, which amounted to six hundred and ninety-five dollars and fifty-one cents, and that the plaintiffs had paid The

decree and costs in the admiralty proceedings, amounting to three thousand and eighty-five dollars and sixty-five cents. The plaintiffs produced a record of the district court of the United States for the district of Massachusetts, which showed that the owners of the *Ellen Maria* had filed a libel against the *St. Andrew*, alleging that a collision between the two vessels had occurred through the negligence of the master and crew of the *St. Andrew*, whereby the *Ellen Maria* was damaged; that notice to all persons concerned was given by publication; that the *St. Andrew* was taken into the custody of the marshal, but was afterwards delivered to the owners, on their giving sureties to abide the decree; that the plaintiffs had filed an answer admitting the collision, but denying the negligence; and that a decree was made "upon the facts proved and arguments of counsel," whereby it was adjudged that the libellant recover against the *St. Andrew* two thousand eight hundred dollars and costs. The jury returned a verdict for the plaintiff, and the defendant appealed, and moved for a nonsuit and for a new trial.

Pettigrew and Petigru, for the appellant.

Magrath and Pressley, contra.

By Court, WARDLAW, J. The deposition of the agent in Boston showed the extent of the damage suffered by the *St. Andrew*, but not its cause. Of the fact of collision, and its attendant circumstances, there was no evidence besides the transcript of the proceedings had in the district court of the United States. This we think sufficient. It shows the judgment of a court of competent jurisdiction proceeding *in rem*; and such judgment is binding on all persons interested in the thing upon which the process was served with due warrant and monition: *Mankin v. Chandler*, 2 Brock. 127. Insurers, as persons having interest in the thing which is arrested by the court, and made the subject of adjudication, are bound even by the sentence of a foreign prize court; much more by the decree of the admiralty at home: 1 Phill. Ev. 348.

The *St. Andrew* was, in the course of the proceedings, delivered to these plaintiffs, claiming as owners, upon their stipulation; but this did not convert the case into a proceeding *in personam*. The stipulation was a substitute for the vessel; the claim was upon the vessel, although the owners might have sued personally; the decree was made, not against per-

sons, but against the St. Andrew, and the payment of it, under the stipulation, was less hurtful to the insurers than might have been the sale of the vessel under a decree of condemnation.

The decretal order does not itself set forth the grounds upon which it was made, but these appear fully in the libel. The order declares that "upon the facts proved and arguments of counsel," the court adjudged; and it is manifest that until the court was satisfied of the collision, and of the negligence charged in the libel, the conclusion of the decree could not have been attained. We are of opinion that the decree is evidence of those facts stated in the libel, without proof of which it could not have been made.

The answer which these plaintiffs, as owners of the St. Andrew, made to the libel, admits the collision, but denies the negligence; yet it does not follow that the decree depended upon the admissions of the plaintiffs, for it is impossible that proof of the circumstances affecting the contested question of negligence could have been given without its involving proof of the collision.

Taking it to have been established, according to the allegations of the declaration in this case, that a collision took place through the negligence of the crew of the vessel insured, we are brought to the questions concerning the extent of the liability thereby cast upon the insurers. These questions are, first, as to the hurt done to the insured vessel itself, and second, as to the charge brought upon the insured vessel for the hurt done to the other one.

1. These defendants have zealously contended that the negligence shown exempts them from all liability. Earlier English cases give some countenance to this position, and it was maintained after much discussion in *Grim v. Phoenix Ins. Co.*, 13 Johns. 451; but many later cases, both in England and the United States, have firmly established the doctrine that if the vessel is seaworthy, and the master and crew competent, no negligence of the master and crew, not barratrous, which lead to a peril within the policy, constitutes a defense for the insurers against their responsibility for the damage done by that peril: *Redman v. Wilson*, 14 Mea. & W. 476; *Sadler v. Dixon*, 8 Id. 895; S. C., 5 Id. 405; *Busk v. Royal Exchange Assurance Co.*, 2 Barn. & Ald. 72; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Id. 507; *Waters v. Merchants' Louisville Ins. Co.*, 11 Id. 213; 2 Arnould on Ins. 763. *Cause*

proxima non remota spectatur. A policy of insurance is construed so as to preserve its practical usefulness without nice metaphysical refinements. If a peril that is insured against has been the immediate cause of damage, the purpose of insurance would be defeated, and the general principle, upon which courts refrain from considering the "causes of causes," would be violated, by looking behind this peril for its cause. If we could ask what led to a collision that has itself done hurt, then we might with equal propriety ask why a hidden rock was struck, and show that the master neglected to consult his chart; or in considering any other case of a peril encountered, listen to evidence of careless navigation. The insurers expressly insure against barratry, and may well be supposed to have excluded themselves from the right to urge in their defense any inferior degree of blamable conduct on the part of the master and crew. They have not insured against negligence, and therefore for damage of which negligence is the immediate cause they will not be answerable; but when a peril of the sea has been the immediate cause, and would have been operative whether there had or had not been negligence, the law does not create an exception which is not in the words of the policy, and all inquiry beyond the peril is superfluous. Upon this distinction rest such cases as that where a vessel slightly damaged by stranding was lost by the neglect of the master to repair; the insurers being held liable for the damage done by the stranding, but not for the more serious loss which came directly from negligence: *Tanner v. Bennett, Ry. & Moo.* 182; *Copeland v. N. E. Mar. Ins. Co.*, 2 Met. 432. In the case before us, the insurers were properly held answerable for the hurt received by the *St. Andrew*, for that came from collision, and to recover for it nothing but collision need have been averred. Collision on the sea is generally a peril of the sea: 2 Arnould on Ins. 803; 2 Story C. C. 184; however induced, it proceeds from the action of the winds and waves; if it may not be properly called a peril of the sea when it is induced by the fault of the insured vessel, it is a peril of a similar kind, which comes within the words "all other perils, losses, and misfortunes," which the general clause of the policy contains.

2. Are the insurers answerable for the charge or lien which the collision, occasioned by the negligence of the crew of the *St. Andrew*, brought upon that vessel to meet the damage done the *Ellen Maria*? In *De Vaux v. Salvador*, 4 Ad. & El. 420, there was brought upon an insured vessel a charge which had been

adjusted by arbitrators according to a rule said to be in the law of nations, that divides equally the aggregate loss when a collision takes place between two vessels by mutual fault. Lord Denman, in holding the insurers not liable, considered the charge to be neither a necessary nor a proximate effect of the perils of the sea, but said "it grows out of an arbitrary provision in the law of nations." In weighing this opinion, full force ought to be given to the mutual fault as something indispensably necessary to be added to the collision before the rule of equal division becomes applicable. A like division of the aggregate loss was presented in the case of *Peters v. Warren Ins. Co.*, 14 Pet. 99; but there the adjustment had been made by the decree of a court, and according to a local law of Hamburg, and the decree had ascertained that both vessels were innocent of fault or carelessness. The opinion of the supreme court of the United States was pronounced by Judge Story. He seems to have considered the circumstances of difference between the case before him and that of *De Vaux v. Salvador*, *supra*, as wholly immaterial, and to have been dissatisfied with the latter case. "In all foreign voyages," he said, "the underwriters necessarily have it in contemplation that the vessel insured must, or at least may, be subjected to the operation of the law of the foreign ports which are visited." He treated as an over-refinement, savoring more of metaphysical than of legal reasoning, the notion that the law which prescribes the rule of liability, any more than the decree which ascertains disputed facts, or the officer who executes the decree, can be considered the proximate cause of the loss, which has been legally paid as the consequence of what existed at the moment of collision. The collision he held to be "the sole proximate cause of the loss, the contribution or charge upon the insured vessel being only a necessary consequence thereof; an incident inseparably connected therewith in contemplation of law; a damage immediate, direct, and positive thence ensuing." He adopted the doctrine deduced from the writings of learned continental jurists, that "whenever the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss."

Subsequently, the case of *Hale v. Washington Ins. Co.*, 2 Story C. C. 176, involving an amount too small for an appeal to the supreme court, came to judgment in the circuit court of

the United States for the district of Massachusetts, before judges Story and Davis. That case, like the one now brought before us, in all material particulars, involved a claim against the insurers for a charge brought upon the insured vessel by a collision, which had been occasioned by her own negligence. Judge Story, in his opinion, declared that the case of *Peters v. Warren Ins. Co.*, 14 Pet. 99, covers the case of "a mutual loss to both ships by a collision, which is properly chargeable and apportionable on both *in rem*, whether that loss be by accident or by mutual fault;" and having shown that negligence of the insured is no defense against the responsibility of the insurers for the immediate danger produced by a collision which the negligence occasioned, he considered that *Peters v. Warren Ins. Co.*, *supra*, had shown that the collision was the proximate cause of all losses that came in consequence of it; and he held the insurers answerable for the charge brought upon the insured vessel, just as if the charge had been impressed upon the vessel at the instant of collision. A similar decision of the same question, in a like case, was made in the supreme court of Massachusetts, in *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477 [54 Am. Dec. 770]. Judge Fletcher, who there pronounced the opinion of the court, in an elaborate opinion, expanded the views which had been taken by Judge Story, and parried the arguments that had been urged against them. Soon afterwards, Judge Curtis, who had been of counsel for the defendants in both of the two cases last mentioned, delivered the opinion of the supreme court of the United States in the case of *General Mutual Ins. Co. v. Sherwood*, 14 How. 351. This overrules the case of *Hale v. Washington Ins. Co.*, *supra*, puts *Peters v. Warren Ins. Co.*, *supra*, on the ground of "collision without fault, which was the sole cause of the loss, if the loss was met," and takes from *Nelson v. Suffolk Ins. Co.*, *supra*, the only authorities on which it rests. All precedent for the claim against the insurers for the charge brought upon the insured vessel by a collision occasioned by the negligence of her own crew is thus taken away, if we respect the authority of the supreme court of the United States on this question. And as the question is one upon which uniformity of decision throughout the whole country is specially desirable, we would yield grave doubts to conform to the decision of it which has been made by that high tribunal, so familiar with the subjects involved in it. But the argument of Judge Curtis is itself sufficient to overcome the doubts which induced the instructions

that were given in this case on the circuit, before the case of *General Mutual Ins. Co. v. Sherwood*, *supra*, was seen.

Mere collision could have brought no charge on the vessel insured. The negligence of its own crew was indispensable to the establishment of that charge; that, then, was the cause. The collision followed the negligence, to be sure; but the collision without the negligence would have been inoperative, as the negligence without the collision would have been. It cannot then be said that the charge was a necessary consequence of a peril insured against. Something else was essential to its production, and that something else was not insured against. Considerations of long-established usage and of sound policy peculiarly applicable to this country aid the conclusion which technical reasoning attains; but for all these we refer to the case last mentioned.

There was, then, error in the instructions given on the circuit; and the verdict is wrong so far as it finds for the plaintiffs the sum paid by them in satisfaction of the decree which was rendered against the St. Andrew for damage done by the collision to the Ellen Maria.

It is ordered that a new trial be granted, unless the plaintiffs shall, before or during the next term of the circuit court, enter a *remittitur* of so much of the verdict as finds for the plaintiffs money paid by them on the decree; that is, a *remittitur* of three thousand and eighty-five dollars and sixty-five cents (\$3,085.65), with interest thereon from the twenty-fifth day of December, one thousand eight hundred and fifty-four (25th December, 1854).

Motion granted *nisi*.

O'NEALL, WITHERS, WHITNER, and GLOVER, JJ., concurred.

JUDGMENTS *IN REM* AND THEIR EFFECT AS RES ADJUDICATA.—DESCRIPTION AND DEFINITION.—The descriptions and definitions given of judgments *in rem* have not always been satisfactory. A somewhat elaborate consideration of them was given in the case of *Woodruff v. Taylor*, 20 Vt. 65, where Hall, J., says: "A judgment *in rem* I understand to be an adjudication, pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right, and that it is so *inter partes* appears by the record itself. A judgment *in rem* is founded on a proceeding instituted, not against the person as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration of the *status* of the thing, and it *ipso facto* renders it what it de-

clares it to be." In *Monks v. Chandler*, 2 Brock. 125, Chief Justice Marshall says: "What is the nature of a proceeding *in rem*? And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem*? If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem*, to which all the world would be parties, and by which the rights of all the world would be bound. But this, all know, is not the law. What, then, is the rule by which cases of this description are to be ascertained? I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of process, and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties. The rule is one of convenience and of necessity. In cases to which it applies, it would often be impossible to ascertain the persons whose property is proceeded against, and it is presumable that the person whose property is seized is either himself attentive to it, or has placed it in the care of some person who has the power, and whose duty it is, to represent him and assert his claim. Such claim may be asserted; but the jurisdiction of the court does not depend on its assertion. The claimant is a party whether he speaks or is silent, whether he asserts his claim or abandons it." This latter description is characterized, in Freeman on Judgments, sec. 606, as placing "too much stress upon the idea that the thing on which the judgment operates should be taken into possession on or by the service of process," and as ignoring the cases in which "instead of proceeding against the thing, courts adjudicate upon the *status* of persons and obtain their authority to do so by a service of their process, which, whether actual or constructive, is still in its nature personal;" and after criticising a definition found in 2 Phillips on Evidence, 5, and one given in 2 Smith's Lead. Cas., 6th Am. ed., 660, which is substantially the same as that laid down in *Woodruff v. Norton*, *supra*, and which is quoted with approval in *Lord v. Chadbourne*, 42 Me. 429, S. C., 66 Am. Dec. 290, the author proceeds: "Judgments *in rem*, it is well known, are not, as the name implies, confined to adjudications against things. They are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages. Neither are they, as is frequently stated, binding on the whole world, for decrees of divorce rendered in one of these United States have frequently been disregarded in the other states, and they would almost certainly be treated as nullities in England if the marriage were contracted in that country between natives thereof; and the probate of a will, though considered as a judgment *in rem* in the states in whose courts it is probated, would have no effect over real property beyond the jurisdiction of that state. The distinguishing characteristic of judgments *in rem* is that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against all persons. It seems to us that the true definition of a judgment *in rem* is that it 'is an adjudication' against some person or thing, or 'upon the *status* of some subject-matter' which, wherever and whenever binding upon any person, is equally binding upon all persons."

ATTACHMENT PROCEEDINGS ARE NOT STRICTLY IN REM, although they partake of the nature of proceedings *in rem*. If both the summons and the attachment are personally served in a state, the proceeding is to a great extent one *in personam*, except that the property attached is to be applied in satisfaction of the judgment; while if the summons is not served, and the defendant does not appear, the proceeding against his property by attach-

ment is more in the nature of a proceeding *in rem*; but the judgment is conclusive only against parties and their privies: *Freeman on Judgments*, sec. 607 a; *Drake on Attachment*, sec. 5; *Woodruff v. Norton*, 20 Vt. 65, 74, 75; *Mankin v. Chandler*, 2 Brock. 125; *Cooper v. Reynolds*, 10 Wall. 308; *Maxwell v. Stewart*, 22 Id. 77, 80; *Megee v. Beirne*, 39 Pa. St. 50; compare *Moore v. C. R. I. & P. R. R.*, 43 Iowa, 385, in which proceedings by garnishment were held to be *in rem*.

PROBATE AND ADMINISTRATION PROCEEDINGS.—The nature of these proceedings was touched upon in the note to *Meyer v. Fogg*, 68 Am. Dec. 447. The following observations are made in *Freeman on Judgments*, sec. 606: "A grant of probate or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him." 2 Smith's Lead. Cas., 6th Am. ed., 669; *Noell v. Wells*, 1 Lev. 235; *Allen v. Dundas*, 3 T. R. 125; *Fry v. Taylor*, 1 Head, 594; *Archer v. Mosse*, 2 Vern. 8; *Gingell v. Horne*, 9 Sim. 539. The probate of a will cannot be collaterally avoided on the ground that the will is a forgery; or that the testator made a subsequent will and appointed another executor: *Moore v. Tanner's Adm'r*, 5 T. B. Mon. 42. Neither can it be collaterally impeached on any other ground: *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; nor set aside by a proceeding in chancery: *Colton v. Ross*, 2 Paige, 396; S. C., 22 Am. Dec. 648; *State v. McGlynn*, 20 Cal. 234; *Kerrick v. Bransby*, 7 Brown P. C. 437; *Jones v. Jones*, 7 Price, 663; *Jones v. Frost*, Jac. 466; *Pemberton v. Pemberton*, 13 Ves. 290; *Adams v. De Cook*, 1 McAll. 253. The probate of a will establishes its *status*; and the *status* thus established adheres to the will 'as a fixture, and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world.' *Deslonde v. Darrington's Heirs*, 29 Ala. 92; *Woodruff v. Taylor*, 20 Vt. 65; *Ballou v. Hudson*, 13 Gratt. 682; *State v. McGlynn*, 20 Cal. 234. 'If probate is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to law of the country where the testator was domiciled.' *Whicker v. Hume*, 7 H. L. Cas. 124. 'Of course, such probate does not touch the question of the application of the will to real estate, unless the will be executed and recorded according to the *lex rei sitæ*.' Wharton's Conf. L., sec. 645; Story's Conf. L., sec. 474; *Robertson v. Barbour*, 6 T. B. Mon. 523; *Jones v. Robinson*, 17 Ohio St. 171; *Kerr v. Moore*, 9 Wheat. 565."

DECREE OF SALE.—Orphans' or probate courts, in decreeing the sale of the real estate of decedents, act *in rem*. *Freeman on Judgments*, sec. 609; *McPherson v. Cunliff*, 11 Serg. & R. 422; S. C., 14 Am. Dec. 642; *Wyman v. Campbell*, 6 Port. 219. So a decree of a court of equity, directing the sale of the property of a lunatic, is substantially a decree *in rem*: *Latham v. Wiswall*, 2 Ired. Eq. 294.

MARRIAGE AND DIVORCE.—The effect of a decree of divorce has already been somewhat considered in the note to *Boykin v. Rain*, 65 Am. Dec. 361. In *Freeman on Judgments*, sec. 610, it is said: "A sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties: 2 Smith's Lead. Cas., 6th Am. ed., 670, citing *Dacosta v. Villa Real*, Stra. 961; *Bunting's Case*, 4 Co. 29; *Kenn's Case*, 7 Id. 42; *Meddowcroft v. Huguenin*, 4 Moo. 386; *Perry v. Meddowcroft*, 10 Beav. 122. But it is otherwise when the suit is for a jactitation of marriage, for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances." 2 Smith's Lead. Cas. 670. A sentence in a matrimonial

suit is no doubt binding as a judgment *in rem*, and as such conclusive upon all persons in all countries where the power of the court to establish or annul the marriage relation is conceded. But this relation in some countries, as for instance, in England, until the establishment of the divorce court in 1858, could not be destroyed by the courts of the country wherein it was created, nor would the courts of that country recognize the power of any other courts to annul marital obligations contracted in England between natives thereof. A foreign divorce, therefore, had no effect either *in rem* or *in personam*, if the parties were residents of England married therein: *McCarthy v. Decaix*, 2 Russ. & M. 614; *Rev v. Lolley*, 1 Russ. & R. 237. It is clear that in no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by the tribunals of which the divorce was granted: *Shaw v. Attorney-General*, 39 L. J., N. S., 81; *Shaw v. Gould*, L. R. 3 H. L. Cas. 56; *Robins v. Dolphin*, 1 Sw. & Tr. 37, affirmed in 7 H. L. Cas. 390."

PROCEEDINGS IN ENGLISH COURT OF EXCHEQUER, AND MISCELLANEOUS.—Among the proceedings resulting in judgments or decrees *in rem* are those in the English court of exchequer in cases of forfeiture for treasons, felonies, or a violation of the revenue laws: Freeman on Judgments, sec. 607; *Scott v. Shearman*, 2 W. Black. 977; *Hart v. McNamara*, 4 Price, 154, note; and see *Pinson v. Ivey*, 1 Yerg. 349. "The judgment of acquittal in exchequer, being a judgment *in rem*, is conclusive as to the question of the illegality of the seizure:" *Cooke v. Sholl*, 5 T. R. 256, per Lord Kenyon. The record of condemnation of goods as adulterated is evidence to prove the fact of their being adulterated, in an action between different parties: *Hart v. McNamara*, *supra*; but a record of condemnation of goods seized for an act of forfeiture created by one statute, is not evidence on a charge of an offense against the same goods created by another statute: *Attorney-General v. King*, 5 Price, 195.

"An action of replevin is not *in rem*, because although it is for specific property the jurisdiction of the court is dependent upon the personal service of process, and its judgment is conclusive only upon the parties to the action, and their privies in person or estate:" Freeman on Judgments, sec. 607; *Certain Logs of Mahogany*, 2 Sumn. 589, 592.

In Maine certain proceedings to secure liens on logs are both *in rem* and *in personam*, and the court cannot proceed until it takes steps necessary to give it jurisdiction over the property as well as over the person of the alleged owners: *Sheridan v. Ireland*, 66 Me. 138.

JUDGMENTS AND DECREES IN ADMIRALTY.—A sentence of condemnation of a court of admiralty, especially in the matter of prize, is conclusive everywhere, as to the thing itself, and as to the facts upon which the adjudication is founded: *Hughes v. Cornelius*, 2 Show. 232; S. C., T. Raym. 473; *Skin*, 59; *Smith's Lead*, Cas., 7th Am. ed., 615; *Gelston v. Hoyt*, 3 Wheat. 246, 315; *The Fortitude*, 7 Cranch, 423, 432; *Armroyd v. Williams*, 2 Wash. C. C. 508; *The Mary Anne*, 1 Ware, 104; *The Globe*, 2 Blatchf. 427; *The Rio Grande*, 23 Wall. 465; *Stewart v. Warner*, 2 Am. Dec. 61; *Brown v. Union Ins. Co.*, 4 Id. 204; *Blasque v. Peytavin*, 6 Id. 705; *Cuculla v. Louisiana Ins. Co.*, 16 Id. 199; *Thoms v. Southard*, 26 Id. 467; *Woodruff v. Taylor*, 20 Vt. 65, 74; Freeman on Judgments, secs. 613, 615. In some states, however, the sentence of condemnation of a foreign court of admiralty is conclusive to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded: *Ocean Ins. Co. v. Francis*, 19 Am. Dec. 549; *Vandenheuvel v. United Ins. Co.*, 1 Id. 180; *Bourke v. Grandberry*, 9 Id. 589; *New York F. Ins. Co. v. De Wolf*, 2 Cow. 56; and see *City of Salem v.*

Eastern R. R., 36 Mass. 449. And although the contrary has been suggested, "no distinction exists between a sentence of condemnation and a sentence of acquittal in regard to the principle of *res adjudicata*." Freeman on Judgments, sec. 616; *Gelston v. Hoyt*, 13 Johns. 561; 3 Wheat. 246, 315; *Magown v. New England M. Ins. Co.*, 1 Story, 157; and see *Cooke v. Sholl*, 5 T. R. 256.

In accordance with the foregoing, "a decree condemning a vessel for a breach of a blockade, or for a violation of revenue laws, is conclusive evidence of such breach or violation in any subsequent controversy between the owner of the vessel and the insurers." Freeman on Judgments, sec. 615; *Croudeau v. Leonard*, 4 Cranch, 434; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600; *Baxter v. New England Ins. Co.*, 4 Am. Dec. 125; *Whitney v. Walsh*, 48 Id. 590; *Ludlow v. Dale*, 1 Johns. Cas. 16; *Groning v. Union Ins. Co.*, 1 Nott & M. 537. The principal case is an illustration of this doctrine. The jurisdiction of courts of admiralty to make adjudications binding against persons not parties to the proceedings, it is held, may be limited by stipulation: *Calhoun v. Ins. Co.*, 1 Binn. 293.

A decree *in rem* of a court of admiralty is not, however, conclusive of any fact not necessary to support it: *Maley v. Shattuck*, 3 Cranch, 458; and it may be doubted whether it is conclusive as to the facts necessary to support it, unless it professes to have determined them, and sets them up as the ground of its decision: Freeman on Judgments, sec. 618. It was held at an early day that if a vessel was condemned as good and lawful prize, but no ground for the condemnation was given, it must be presumed to have been on the ground that the vessel was enemy's property: *Salucci v. Woodmass*, 3 Dougl. 345; 8 C., Park. Ins. 362; but as there are other causes for condemnation, this can no longer be considered as the law: *Baring v. Clayett*, 3 Bos. & Pul. 215; *Dalglish v. Hodgson*, 7 Bing. 504; *Fisher v. Ogle*, 1 Camp. 418; *Bailey v. South Carolina Ins. Co.*, 1 Nott & M. 541; *Goiz v. Low*, 2 Johns. Cas. 480; *Fis-simmons v. Newport Ins. Co.*, 4 Cranch, 185. If a sentence of condemnation is shown to be based either on the ground that the vessel was enemy's property, or that it had violated some law or regulation of the country where it was condemned, the sentence of condemnation is not evidence of a breach of the warranty of neutrality: *Bernardi v. Motteaux*, 2 Dougl. 575; *Lothian v. Henderson*, 3 Bos. & Pul. 526; and if a decree of condemnation states a particular ground, and then condemns the vessel on account of such ground, or otherwise, the grounds of the decree are uncertain, and the decree is not conclusive: *Robinson v. Jones*, 8 Mass. 536. But if a decree professes to proceed for a specified cause, and for other causes mentioned, it is conclusive of the existence of the cause specified: *Baxter v. New England Ins. Co.*, 4 Am. Dec. 125. If a sentence of condemnation appears on the face of the proceedings to have been founded on facts which do not warrant the judgment, it is not conclusive of the condemnation: *Williamson v. Tunno*, 2 Id. 654.

"A sentence of a court of admiralty, professing to proceed *in rem*, is liable to be avoided, upon showing that the tribunal had no jurisdiction over the *res* against which it proceeded; or that by the law of its creation it had no authority to determine the questions on whose determination the sentence is founded." Freeman on Judgments, sec. 614; *Rose v. Himely*, 4 Cranch, 241, 268; *Cheriot v. Foussat*, 3 Binn. 220.

The effect of a judgment *in rem*, it seems, is also not conclusive on the whole world, but the conclusive nature is confined to those persons who, from their interest in the proceeding *in rem*, were entitled to appear in such proceeding and assert their interest in the thing condemned: Freeman on Judgments, sec. 617; *The Mary*, 9 Cranch, 126.

The proceedings in a court of admiralty being *in rem*, the death of one of the parties to the decree does not affect the right to have it executed: *Penhallow v. Doane's Adm'rs*, 3 Dall. 54, 86.

The subject of the necessity of notice in judicial proceedings, with reference to proceedings *in rem*, is discussed in the note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 274.

NEGLECTANCE OF INSURED, HIS AGENTS OR SERVANTS, OCCASIONING LOSS INSURED AGAINST, is no defense to an action on a policy of insurance: Note to *Hillier v. Allegheny Co. M. Ins. Co.*, 45 Am. Dec. 660; *American Ins. Co. v. Insley*, 47 Id. 509; *Gates v. Madison Co. Ins. Co.*, 55 Id. 360, and note.

INSURER'S LIABILITY FOR INJURIES TO ANOTHER VESSEL, FOR WHICH OWNERS OF INSURED VESSEL WERE OBLIGED TO PAY: See *Nelson v. Suffolk Ins. Co.*, 54 Am. Dec. 770, and the note thereto, where the question is fully discussed.

MAIN v. NORTH-EASTERN RAILROAD COMPANY.

[12 RICHARDSON'S LAW, 82.]

TRESPASS QUARE CLAUSUM FREGIT MAY BE MAINTAINED AGAINST PRIVATE CORPORATION.

TRESPASS *quare clausum fregit*. A general demurrer was filed, but the court held that the action would lie against a railroad corporation, and overruled the demurrer. The defendant thereupon appealed.

Martin, for the appellant.

Phillips, *contra*.

By Court, WHITNER, J. The single question presented by the motion now submitted is, whether an action of trespass *quare clausum fregit* can be maintained against a corporation of the character now before the court.

It is said to be new in this state, and we do not find that it has been expressly decided in our courts. In the case of *White v. City Council of Charleston*, 2 Hill (S. C.), 571, which was an action of *tres. vi et armis*, Judge Harper, in 1835, said: "That in some instances an action of trespass may be maintained against a corporation, I do not question, though many authors have expressed a contrary opinion."

This is said to have been an *obliter dictum*, as the nonsuit ordered on circuit was sustained in the court of appeals; yet it is manifest the examination of the general proposition, whether a corporation could be sued for trespass merely, was called for to guard against supposed error in some of the views taken by the circuit judge in his report of the case. It is referred to now

as indicating the opinion of that eminent judge upon a pretty full examination of the point, upon principle and authority. It serve a present purpose in vindicating the judgment now to be announced, and being accessible to the profession, dispenses with the necessity of repetition.

There is an incongruity, it is thought, to hold that a corporation can commit a tort; a mere creature of the law, "of a highly refined and intangible nature, whose properties and attributes lawyers alone can understand;" that corporations can only do what by law they are authorized, and cannot therefore invest any one with power to do wrong; hence, that courts are driven of necessity to deal with individuals from whose acts injuries result. Such premises would lead to conclusions at war with the interests of society, and are opposed to the practice of our courts in innumerable cases. Surely it needs neither argument nor authority to demonstrate that these positions are untenable, when it is seen that they lead to the conclusion that corporations can do no wrong.

Why, it may be well asked, should not the rule be the same substantially in reference to corporations and their agents as between individuals and their servants? The vast multiplication of corporations, and the variety of interests affected thereby, have demanded and suggested a course of proceeding adapted to the ends of justice; and in the first application of wholesome rules, appropriate remedies have been gradually unfolded, as well in enforcing the rights of corporations "in suing" as in holding them amenable in "being sued."

In the discharge of the duty assigned on the present occasion, the aid derived from recent text-writers has greatly lessened the labor of research. The authorities on which they rely as far as practicable have been verified, and references fully sustain the principles they have laid down.

The profession will readily recognize the distinction taken between corporations of different kinds and a difference in the proceedings authorized in consequence: *White v. City Council of Charleston*, 2 Hill (S. C.), 571; *Mower v. Inhabitants of Leicester*, 9 Mass. 247; *Fowle v. Common Council of Alexandria*, 3 Pet. 409.

The present question is not as to a public corporation instituted for the purposes of government, or a *quasi* corporation created by statute and invested with particular powers without their consent, but as to a corporation exercising its functions for the benefit of its members, and holding its franchises upon contract.

On examining the great array of cases in which corporations of the latter kind have been held to answer for the acts of agents, the act of the agent being regarded as the act of the principal in actions on contract, in trover, in case for neglect of duty and want of diligence and care in the performance of duty, the surprise is, rather as Grant, in his excellent treatise on corporations, 289, declares: "An action on the case having been fully established to lie against a corporation, it seems remarkable that it should ever have been a matter of doubt whether trespass would lie."

Tilghman, C. J., in debating the same point, asks for a solid ground of distinction in the rule between contracts and torts, and adds that the doctrine (that a corporation could not commit a tort) was fallacious in its principles and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies, for a turnpike company may do great injury by means of laborers who have no property to answer the damages recovered against them: *Chestnut Hill and S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. 17 [8 Am. Dec. 675].

The cause of doubt as to this action seems to rest on Kyd, 233, and some cases referred to by him as is said by Judge Harper and by Angell & Ames on Corporations, 388. But the technical reason is given and pronounced against, and upon authority cited, hence the authors (Angell & Ames) add: "That it seems to be now the better opinion, both in England and in this country, that a corporation may be sued for trespass committed by its authorized agents." Not being aware, as they say, that the point has been expressly decided in any modern case, they proceed to submit fully the authorities which relate to the subject. This was in 1831. Grant, in his treatise on corporations, published in 1850, after referring to the doubts which had been expressed, p. 278 (80 Law Lib. 289), says: "However, it is only of late that the law has been considered to be settled affirming the liability of a corporation to an action of trespass." His reference is to the case of *Maund v. Monmouthshire Canal Company*, 4 Man. & Gr. 454; S. C., 43 Eng. Com. L. 238. This was an action of trespass, and Tindal, C. J., discharged the rule, saying: "The process in case and trespass being the same, it is impossible to see any distinction between the two actions"—meaning as to the liability of a corporation for an act done by their agent, on which subject he was treating. This was in 1842.

The author (Grant on Corporations) adds further, that this

is perfectly in accordance with the old law, appears from cases determined in the reigns of Edward III., Henry VI., Edward IV., and Henry VII., which were not brought to the notice of the court in the last-mentioned case. A note is subjoined with full reference to these ancient cases.

In the case of *Yarborough v. Bank of England*, 16 East, 6, Lord Ellenborough says: "The only question was, whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort."

By a reference to Grant's treatise, quite an array of cases are cited against railway companies, banks, and other corporations, in case and trover, in which actions have been sustained in English and American courts, recognizing the principle generally that a corporation is liable in tort for the tortious act of their agent, thus placing the corporation in such respect very much on the same footing as individuals. The character of the proof necessary to establish the agency involves an inquiry with which we are not now charged.

The motion to reverse the decision of the circuit court overruling the demurrer is dismissed.

O'NEALL, WARDLAW, WITHERS, and GLOVER, JJ., concurred.

Motion dismissed.

TRESPASS QUARE CLAUSUM FREIGHT MAY BE MAINTAINED AGAINST PRIVATE CORPORATION: *Lyman v. White River Bridge Co.*, 16 Am. Dec. 705; *Whiteman's El's v. Wilmington etc. R. R.*, 33 Id. 411; *Underwood v. Newport Lyceum*, 41 Id. 260; *contra: Foote v. City of Cincinnati*, 34 Id. 420, a case, however, against a city, but which lays down some very general propositions. The principal case is cited in *Coleman v. Chester*, 14 S. C. 291, as holding that an action of trespass can be maintained against a private corporation, but as recognizing a distinction, in this respect, between private and municipal corporations. As to the liability, in general, for torts, see the notes to *Riddle v. Proprietors*, 5 Id. 42; *Orr v. Bank of the United States*, 13 Id. 596; also *Moore v. Fitchburg R. R.*, 64 Id. 83; *Jones v. Western Vermont R. R.*, 65 Id. 206, and the notes thereto.

SAMUEL v. DINKINS.

[12 RICHARDSON'S LAW, 172.]

JUDGMENT AGAINST TENANT IN TRESPASS TO TRY TITLE DOES NOT CONCLUDE LANDLORD, although the landlord's title was set up as a defense to the action, and the landlord was present at the trial and aided in the defense.

TRESPASS to try title. The defendant gave in evidence a recovery by him in an action of trespass to try title to the same land, which he had brought against one Musco Samuel. Musco Samuel had entered under the plaintiff in this action, and set up the plaintiff's title as a defense to the former action, and the plaintiff was present at the former trial and aided in the defense. The presiding judge ruled that the recovery concluded the plaintiff, and the plaintiff thereupon moved for a new trial, assigning this instruction as error.

Carroll, for the appellant.

Adams, *contra*.

By Court, WARDLAW, J. This plaintiff sues for the same land which this defendant formerly recovered in an action by him against Musco Samuel; and the verdict which has been rendered in this case may be said to establish that Musco Samuel entered under this plaintiff's title, and set that title up as his defense in the former action, and that this plaintiff was present at the former trial and aided in the defense. The question is, whether the former recovery concluded this plaintiff, as it did Musco Samuel.

In the former action, this plaintiff might, under the seventy-second rule of court, have entered himself as a defendant; and having done so, he might have urged matters of defense which Musco Samuel alone could not urge. The case of *Pope v. Clarke*, 2 Strobbh. 361, shows that when a landlord has, under the rule of court, associated himself with his tenant as a defendant, the plaintiff having shown a title which would avail against the tenant, may be successfully resisted by the landlord showing such paramount title as would serve for recovery if the landlord were plaintiff and the plaintiff were defendant. Thus in one action the same result may be attained which was reached by two, in the cases of *Muldrow* *ads. Jones*, Rice, 64, and *Jones v. Muldrow*, Cheves, 254. There Jones, having entered under Gee, was in the first action made to yield to Gee's

vendee, but in the second prevailed against that vendee by force of Stephenson's title, which in the first action was excluded by the acknowledgment implied from the entry under Gee.

A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against his landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still, if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense which, as a party, he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded. His being a party might have caused change in the jury, or in the admissibility of evidence, or in the conduct of parties or counsel, which might have altered the result.

Knowledge of the former case, and active assistance rendered in it, are very different in their effect, when urged by the original plaintiff against a third person in a new action of trespass to try titles, and when urged by the former defendant in a new action brought by him on covenant of warranty, or some other new action wherein notice, or the modern voucher, is material. It has been held that in an action for mesne profits brought against a landlord not party to the previous ejectment, notice *en pais* of the action of ejectment, with strong circumstances of interference in preparing and presenting the defense, would not conclusively establish the plaintiff's title against the landlord: *Chirac v. Reinecker*, 2 Pet. 613; S. C., 11 Wheat. 280. This case has been approved and somewhat sustained by our case of *Lamar v. RAYSON*, 7 Rich. L. 513; and is conformable to the result of our case of *Bank of South Carolina v. Bridges*, 11 Id. 89.

It is not inconsistent with the case of *Parker v. Leggett*, 12 Rich. L. 198, where all the parties in the second action were parties in the first, the matter was the same in both actions, and the sole objection was that one of three defendants had died.

The motion for a new trial is granted.

GLOVER and MUNRO, JJ., concurred.

O'NEALL, J., dissented.

Motion granted.

LANDLORD, WHETHER AFFECTED BY LITIGATION AGAINST OR IN FAVOR OF TENANT: See Freeman on Judgments, sec. 169, where the principal case is cited.

CHAPLIN v. BARRETT.

[12 RICHARDSON'S LAW, 264.]

TROVER WILL NOT LIE AGAINST PERSONAL REPRESENTATIVES for a conversion by the deceased in his life-time.

TROVER for the conversion of a negro girl, alleged to have been committed by Massena Taylor, the defendant's intestate, in his life-time. The jury found for the plaintiff, and the defendant appealed.

Perry, for the appellant.

Sullivan, *contra*.

By Court, MUNRO, J. Assuming Massena Taylor, the defendant's intestate, to have been guilty of the wrongful conversion of the slave, the subject-matter of this action, the question is, Can trover be maintained against his legal representative? Unless the affirmative of this proposition can be sustained, it is clear that the plaintiff's action must fail.

In 1 Ch. Pl. 68, the rule is thus stated: "We have seen the right of action for the breach of a contract upon the death of either party, in general survives against the executor or administrator of each; but in the case of torts, where the action must be in form *ex delicto*, for the recovery of damages, and the plea is not guilty, the rule at common law was otherwise, it being a maxim that *actio personalis*, etc.; and we shall find that the statute of 4 Edw. III., c. 7, has altered this rule only in its relation to personal property, and in favor of the personal representative; but if the action can be framed in form *ex contractu*, the rule does not apply." *Hambly v. Nott*, 1 Cowp. 371, is a case in which the whole doctrine was fully discussed by Lord Mansfield, who, in conclusion, remarks: "There are express authorities that trover and conversion does not lie against the executor. I mean where the conversion is

by the testator, the form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator, and no mischief is done; for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes to the plaintiff upon the principle of civil obligation, another form of action may be brought, as an action for money had and received." To the same effect will be found the case of the *Executors of Middleton v. Robinson*, 1 Bay, 56. From the foregoing authorities, it is then manifest that the plaintiff's action has been entirely misconceived; and as no recovery can be had by him against the defendant in the present form of action, it is therefore ordered that judgment of nonsuit be entered.

O'NEALL, WARDLAW, WITHERS, WHITNER, and GLOVER, JJ., concurred.

Motion granted.

THE PRINCIPAL CASE IS QUOTED AND APPROVED in *Huff v. Watkins*, 20 S. C. 430, to the point that where a plaintiff sued in form *ex delicto*, and the defendant died before judgment, the action could not be revived against the personal representatives of the deceased. To the same effect, see *Potts v. Leon*, 56 Am. Dec. 419.

WICKER v. POPE.

[12 RICHARDSON'S LAW, 337.]

ASSIGNMENT OF PRISON-BOUNDS BOND CAN ONLY BE MADE TO PLAINTIFF IN EXECUTION, under the South Carolina act; and a previous attempt to assign it to another is a nullity and may be disregarded.

VALUE OF ARTICLES MENTIONED IN SCHEDULE filed under the South Carolina prison-bounds act is immaterial when no assignment of the property, or offer to assign, is shown.

ALTERATION OF INSTRUMENT MAY BE SHOWN TO HAVE PRECEDED EXECUTION by the appearance of the instrument itself.

DEBT on a prison-bounds bond. The plaintiff alleged a recovery of a judgment against the defendant, Charles P. Pope, the arrest of Pope under a *capias ad satisfaciendum*, the execution by the defendants of the bond in suit to the sheriff, H. H. Kinard, the assignment of the bond to the plaintiff, and three breaches of the bond; viz., that Pope went beyond the limits before he was discharged; that the schedule rendered by him did not include all his estate nor sufficient to satisfy

the sum due on the *ca. sa.*; and that he did not sign the property contained in the schedule. The defendants pleaded *non est factum*; a special plea of erasure in the bond; a prior assignment of the bond to one Kibler; and performance of the condition. At the trial, the plaintiff proved the filing of the schedule, the execution of the bond, and its breach; that no assignment accompanied the schedule, nor order of discharge; and that the *ca. sa.* and judgment on which it was founded were unsatisfied. The prefatory statement of the bond had read: "Whereas, the said H. H. Kinard has been arrested," etc., but the name "H. H. Kinard" had been erased, and "C. P. Pope" inserted. The condition of the bond referred to "the said C. P. Pope." The defendant moved for a nonsuit, on the ground of this erasure, but the court overruled the motion. The defendant sought to prove the value of the articles mentioned in the schedule, but the court held their value immaterial, as no assignment of the property, or offer to assign, had been shown. The defendant also showed a prior assignment of the bond to Jacob Kibler, but the court held that under the prison-bonds act there could be no other assignment than to the plaintiff, and the attempt to assign it to Kibler was therefore a nullity. The court submitted to the jury the question whether the erasure in the bond appeared to have been made before the execution. The verdict was for the plaintiff, and the defendants appealed, and moved the court for a nonsuit on the grounds: 1. That the condition of the bond sued on was erased, and there was no proof that the same was made before the execution; 2. That the bond had been previously assigned; and 3. That the schedule was of sufficient value to pay the *ca. sa.*

Jones, for the appellants.

Baxter, contra.

By Court, WARDLAW, J. In relation to the second and third grounds of appeal, this court approves of what is said in the report; and it is unnecessary to say more.

The appellants' counsel has adduced many authorities to show that if, on the production of an instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. But it is well replied that, in the absence of all other evidence, the appearance may

itself be explanatory, or in other words, the internal evidence afforded by the instrument itself may show that the alteration preceded the execution; as if the alteration appears in the same handwriting and ink with the body of the instrument, or if it is against the interest of the party deriving title under the instrument. "Generally speaking," says Mr. Greenleaf, whose condensation of the law on this subject is adopted by this court (1 Greenl. Ev., sec. 564), "if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which, the alteration was made, as matters of fact, to be ultimately found by the jury, upon proofs to be adduced by the party offering the instrument in evidence."

Ordinarily these questions are determined by the court in the first instance, upon a preliminary objection to the admissibility of the instrument; but they are often open again to the jury; always so when the validity of the instrument is directly involved in the issue. In the present case, the defendants raised issues of fact involving direct inquiries into the effect of the alteration, both under the plea of *non est factum*, and the special plea of erasure. It appeared that the name of the sheriff, Kinard, to whom the bond was payable, had been inserted in the recital, at the blank left for the name of the defendant in the *ca. sa.*, and had then been struck out, and in lieu of it the name of that defendant, C. P. Pope, inserted. That this had been done before the execution was presumable from the manifest requirements of the instrument; but it seemed to be made more certain by the occurrence in the condition, of the words plainly written, "the said C. P. Pope," which could refer to nothing but the name of C. P. Pope, inserted in the recital. The jury could not reasonably have been expected to be dissatisfied with appearances so plainly explanatory; and this court is not at all inclined to disturb the verdict in favor of the instrument.

The motion is dismissed.

WITHERS, WHITNER, GLOVER, and MUNRO, JJ., concurred.

Motion dismissed.

PARTY OFFERING ALTERED INSTRUMENT MUST ACCOUNT FOR ALTERATION: *Jackson v. Osborn*, 20 Am. Dec. 649; *Bailey v. Taylor*, 29 Id. 321; *Humphreys v. Guillou*, 38 Id. 499; *Inglish v. Breneman*, 41 Id. 96; *Dow v. Jewell*, 45 Id. 371; *Wilam v. Henderson*, 48 Id. 716; *Simpson v. Stackhouse*, 49 Id. 554; *Clark v. Eckstein*, 62 Id. 307. But the alteration of a document in a material part may be explained by the internal evidence derived from the paper itself: *Kennedy v. Moore*, 17 S. C. 466, citing the principal case.

QUESTION OF ALTERATION IS FOR JURY: *Bailey v. Taylor*, 29 Am. Dec. 321; *Bliss v. McIntyre*, 46 Id. 166; *Beaman v. Russell*, 49 Id. 775, and note; *Clark v. Eckstein*, 62 Id. 307; *Printup v. Mitchell*, 63 Id. 258.

CASE IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

HOWARD *v.* CANNON.

[11 RICHARDSON'S EQUITY, 22.]

NON-RESIDENT CREDITORS WILL BE RESTRAINED FROM ENFORCING JUDGMENTS against property assigned for the benefit of creditors, when recovered by them against the assignor after the assignment.

COURT OF EQUITY OF STATE WILL RESTRAIN PARTY WHO HAS OBTAINED JUDGMENT IN UNITED STATES COURT from enforcing his judgment against property not subject to levy and sale.

BILL in equity. The facts are stated in the opinion.

Dargan, for the appellant.

Phillips, *contra*.

By Court, WARDLAW, Chancellor. Robert R. Cannon, on March 18, 1858, conveyed to the plaintiff, Richard G. Howard, all his lands, chattels, and credits, in trust, primarily, for the payment of his debts in terms, and according to a classification, which are not apparently impeachable. The assignor was greatly embarrassed in his affairs, to the extent of probable insolvency; and the assignee filed this bill to call in the creditors, and marshal the assets of the assignor. After the conveyance to the plaintiff, Cummings & Styron, residents without the limits of this state, recovered judgment for a large sum against the assignor, Cannon, in the circuit court of the United States for South Carolina; and when this bill was filed, were proceeding to execute their judgment by the seizure and sale of some of the slaves assigned through the agency of W. H. Wingate, deputy of D. H. Hamilton, who is the marshal of

the United States for the district of South Carolina. Upon hearing affidavits supporting the allegations of the bill, Mr. Commissioner Haynesworth granted a special injunction restraining Cummings & Styron, in common with other creditors of Cannon who had obtained judgments against Cannon after the execution of the deed of assignment to plaintiff, from seizing and selling the property assigned. Cummings & Styron, by attorney, pleaded to the jurisdiction of this court on the ground that the subject of suit was under the exclusive jurisdiction of the circuit court of the United States, inasmuch as that court had first taken cognizance of the controversy between them and Cannon; and their agent, Wingate, in like manner, pleaded to the jurisdiction of this court. The chancellor on circuit sustained the pleas of Cummings & Styron, and of Wingate, to the jurisdiction of this court, and excepted them from his order calling in the creditors of Cannon to present and prove their demands.

The plaintiff appeals from so much of the decree as sustains the pleas to the jurisdiction and exempts Cummings & Styron from the call on creditors to present and prove their demands. The chancellor proceeded mainly on the reason, not suggested by the pleas, that Cummings & Styron were non-resident and had no such property here, the subject of litigation, as brought them within the cognizance of the state court.

The plaintiff, in his first ground of appeal, impugns, and we think justly, this course of reasoning, because Cummings & Styron had a direct and substantial interest in the subject of controversy. The act of 1784, 7 Stats. 210, gives jurisdiction to the court as to absent defendants notified by advertisement in the newspapers for three months, without express restriction as to their having property in the state. But the obvious injustice of concluding a party where neither his person nor property was within the jurisdiction, properly induced the court to give an interpretation to the act conformable to justice. It has not been questioned since *Winstanley v. Savage*, 2 McC. Ch. 435, that non-residents cannot be made parties except in reference to their property here. In this case, however, Cummings & Styron had immediate property in the subject of controversy, for the deed to the plaintiff was an express trust for all the creditors of Cannon in the property assigned. It was held in *Kinloch v. Meyer*, Spears Eq. 427, that the court of equity would entertain jurisdiction of a bill seeking to subject the share of an absent distributee in the hands of an ad-

ministrator to the payment of the distributee's debts. That case is conclusive of the principle involved in this case. Here the issue is as to the share of absent creditors, in the hands of a trustee, to be administered. This is simply a matter of authority, and it is superfluous to reiterate reasoning well expressed heretofore. I content myself with citing some of the cases: *Bowden v. Schatzell*, Bailey Eq. 360 [23 Am. Dec. 170]; *Cruger v. Daniel*, 1 McMull. Eq. 189; *Garden v. Hunt*, Cheves Eq. 42; *Taylor v. Williamson*, 1 McMull. Eq. 348; *McKinne v. City Council of Augusta*, 5 Rich. Eq. 55; *Hurt v. Hurt*, 6 Id. 114; *Brenan v. Burke*, Id. 200.

The second ground of appeal assails the reasoning expressed in the pleas, that the subject of controversy was within the exclusive jurisdiction of the circuit court of the United States, which rendered the judgment of *Cummings & Styron v. Cannon*. We have every disposition to avoid even the appearance of conflict with the tribunals of the United States created under the constitution, and we have no disposition to quibble between restraining processes and restraining persons from proceeding under them. But surely there is a substantial difference between undertaking to revise the judgment and procedure of a co-ordinate or even superior tribunal, and interfering to restrain parties from acts not authorized by our equals or superiors. It does not impugn in any respect the judgment of the federal tribunal, that we interpose to prevent parties under our control from abusing the process of that court. It has granted a judgment against Cannon, and we make no offer to restrain the execution of their judgment from the estate of Cannon. But we do not perceive that, under a judgment against Cannon, the estate of Howard or any other person can be legitimately seized and sold. The judgment of *Cummings & Styron* is left intact, and we simply determine that they or their agent had no authority to seize the property of a stranger under pretense of its operation. To determine otherwise would be to adjudge that a plaintiff in execution against a pauper might obtain satisfaction from any rich inhabitant of the state.

It is suggested, however, that the plaintiff should have applied to the circuit court of the United States on the equity side for relief in this case. But the plaintiff could not have obtained relief there, as most of the creditors were resident in the same state with himself. It is unnecessary to discuss the provisions of the constitution and of the acts of congress in

relation to this matter, as it is settled by adjudication that the circuit court of the United States has no jurisdiction as to defendants resident out of the district in which the court is held: *Russel v. Clark*, 7 Cranch, 69; *Carneal v. Banks*, 10 Wheat. 181; *Ford v. Douglas*, 5 How. 143.

It is ordered and decreed that the appeal be sustained, and the circuit decree modified accordingly.

It is further ordered and decreed that the defendants Beaseley and Wingate deliver to the plaintiff the chattels seized by them.

JOHNSTON and DUNKIN, chancellors, concurred.

Decree modified.

JUDGMENTS OF UNITED STATES COURTS, EXTRACT OF IN STATE COURTS:
See *Town of St. Albans v. Bush*, 23 Am. Dec. 246; *Lowry v. Erwin*, 39 Id. 556;
Dudley v. Lindery, 50 Id. 522; *Voss v. Morton*, Id. 750; *Reed v. Vaughan*, 55
Id. 133, and notes. As to whether a judgment of a court of the United States
will be aided in a state court, see *Tarbell v. Griggs*, 23 Id. 790, and note.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

FISHER v. POLLARD.

[2 HEAD, 314.]

GENERAL WARRANTY OF SOUNDNESS DOES NOT EXTEND TO DEFECTS KNOWN OR PLAINLY VISIBLE to the purchaser, and if the warranty be in writing, parol evidence is nevertheless admissible to charge the purchaser with knowledge of any particular defect.

ASSUMPSIT. Defendant appeals from judgment for plaintiff. The opinion states the facts.

M. and H. Brown, for the plaintiff in error.

Maxwell and Doherty, for the defendant in error.

By Court, CARUTHERS, J. In August, 1857, Pollard sold to Fisher a slave named Bill, for eight hundred dollars, and a certain iron-gray horse, provided the slave, then runaway, could be obtained in possession by the vendee. In that event, the money was to be paid, and the horse delivered; and "said Fisher agrees to make all things right as to the horse above spoken of, as to soundness in every respect." Such is the contract as set forth in a writing that day signed by both parties. The events contemplated all, very soon after, happened. The money was paid, the horse delivered, and a bill of sale executed for the slave. In March, 1858, this action was instituted for unsoundness in the horse, and a verdict and judgment for one hundred and fifty dollars against the defendant.

There is nothing in the objection, that as this trade was conditional, that is, only to take effect in the event the slave was

reclaimed, the written warranty of the soundness of the horse was not obligatory. The contingency having happened, it took full effect as if it had been at first without condition. So the contract of warranty was binding.

The main controversy in the case upon the trial was as to the extent of the warranty. It was conceded that the horse was unsound in one or both of his eyes; but this, it was insisted, was visible to the most casual observer, and was, in fact, well known to the vendee, and consequently not covered by the warranty. How the facts were in that respect is not so material now, as the jury have passed upon them, but the question before us is, whether the law was correctly charged by the court on that doctrine.

It is well settled that a general warranty of soundness, whether in writing or parol, does not extend to an unsoundness or defect which is plain and obvious to the purchaser, or of which he had cognizance: 1 Parsons on Cont. 460 (top), and note i; *Long v. Hicks*, 2 Humph. 308. This is upon the ground that it will not be presumed that the parties intended to embrace in the general terms employed in the contract imperfections well known to both, or so plainly visible and obvious as that they must be presumed to have been known by the vendee. This rule is always applied for the purpose of restricting the general words used, to the manifest intention and understanding of the parties. It would be absurd to suppose that the seller intended to make, and the vendee supposed he was receiving, a warranty against defects well known to both parties, or so apparent and visible as to be obvious to ordinary observation.

The case of *Long v. Hicks*, 2 Humph. 305, decides that "a written warranty does not extend to defects which are visible, or of which the vendee is informed at the time of sale." The case before the court, to which this principle was applied, rested upon the correctness of the charge to the jury, in these words: "That if the negro was unsound at the date of the warranty, there was a breach, and that they were to disregard the testimony as to the knowledge of the plaintiffs in reference to the unsoundness." The court had rejected all proof of the knowledge of the purchaser of the unsoundness. It is stated in the opinion in that case, that the proof shows "that the unsoundness was so obvious that any one who had ever seen a negro might discover it by casual view;" and the purchaser, in reference to it, said he did not care, as the woman was worth

the money he was paying for both. That decision was certainly correct, and so is the rule laid down in reference to it. That case was fully recognized in the charge now before us.

But the character of the known or patent defects, which, according to this principle, are excluded from the warranty, is another question. The want of a tail, or ear, or limb, are certainly excluded, but any other permanent defect or unsoundness known or visible would likewise be embraced by the rule. But if it is made known, or seen, that there is some defect in the eye, or a splint on the leg, without present lameness from it, but afterwards the eye went out from the injuries, or the horse became lame from the effects of the splint, yet the warranty of soundness would cover those defects, because the extent of the disease or defect was not known. The principle seems to be, that to exclude a defect from the operation of a general warranty of soundness, upon the ground that it is known to the purchaser, or might have been because of it being plain and obvious, it must appear that the vendee was not misled as to its character or extent. The fact that a slave has a cough, or doubtful indications of a cancer, white swelling, dropsy, or any other disease, and this known to the buyer, does not save the seller from the obligations of a general warranty of soundness, if these appearances and indications should turn out to be the incipient stages of a permanent disease: 1 Parsons on Cont. 460, note i, and cases there cited. To exclude a defect or disease from the operation of a warranty, it must be of such a character or description as to disclose to the vendee not only the existence, but the extent of the defect or disease, and if this is not so, it is covered by the warranty.

To illustrate by the case in hand. Some defect in the eye of the horse was not only made known, but was visible; but it was said by the vendor it resulted from an injury recently received by a blow, and its extent was not declared, nor could it be discovered. This sort of case is covered by the warranty, even though there be no fraud.

The part of the charge particularly objected to is this: "If a horse is sold with a written warranty of soundness, the vendor could not protect himself from an action by introducing parol proof to show that he disclosed the unsoundness at the time of the sale, and that the vendee took the horse at his own risk." Proof to show these facts was offered and rejected. We are not able to reconcile this position in the charge to the general rule, that defects known to the vendee are not covered

by the warranty. The rule stated in *Long v. Hicks*, 2 Humph. 305, is, that a written warranty does not extend to "defects of which the vendee is informed at the time of sale." If the writing specified that the eyes or the limbs were sound, or that the animal was free from the glanders, or any other specified disease, then it would not be admissible to prove in the face of the writing that such disease was made known or excepted; the rule would be the same if the warranty was in parol. But when the warranty is in general terms, we think the law is too well settled to be now disturbed that defects known or visible are not covered; and consequently, proof to establish these facts must be competent. The object of the rule is, not to defeat or contradict the contract, but to define and explain it; not to frustrate the intention of the parties, but to ascertain what was meant by them to be covered by the undertaking of the vendor. The rule itself would seem, at first view, to infringe upon other established principles, but with this explanation of it, perhaps it does not. At all events, it is fixed and settled, whether it be consistent with other rules, or an exception to them.

In this particular, we think his honor erred, though his charge is, in other respects, very able and correct on the doctrine involved.

From what we see of the case, it is by no means certain that a correct charge on this point, with the proof rejected, would have changed the result; because it may be that all which was said and made known at the time would only amount to the disclosure of a blemish or injury that might not have been understood by the parties to be permanent, in which case it would not be exempted from the warranty, but be covered by it, in the event that it turned out to be more serious and fatal than the information communicated, or the appearance indicated. In other words, the extent of the disease or defect may not have been obvious or made known, and if not, as we have seen, it would still fall under the warranty of soundness.

But the defendant was entitled to the benefit of his proof on this point, before the jury, on a correct charge.

For this error, the judgment will be reversed.

GENERAL WARRANTY OF SOUNDNESS does not extend to defects apparent on inspection, or known to the buyer: See note under *Roberts v. Jenkins*, 53 Am. Dec. 178; and *President of Connersville v. Wadleigh*, 41 Id. 214.

PURCHASER'S KNOWLEDGE OF EXISTENCE OF DEFECT does not exempt the seller from liability upon his express warranty of the soundness of a chattel: See *Stucky v. Clyburn*, 34 Am. Dec. 590.

DEAN v. VACCARO.

[2 HEAD, 488.]

DELIVERY OF GOODS UPON WHARF AT PUBLIC PORT, with notice thereof to consignee, there being no contract for any particular mode of delivery, is sufficient to discharge from liability common carriers by water in the internal coasting and river trade.

NOTICE TO CONSIGNEE OF ARRIVAL OF GOODS IS NECESSARY, and will not be excused by the fact that a custom of delivering goods to public draymen prevails at the port.

MEASURE OF DAMAGES IS NET VALUE OF GOODS AT PLACE OF DELIVERY, where a common carrier becomes liable by failing to deliver the goods, or by delivering them at the wrong place.

ASSUMPSIT. The opinion states the facts.

E. M. Yerger, for the plaintiffs in error.

Massey, for the defendants in error.

By Court, CARUTHERS, J. This suit was instituted to recover the value of several boxes of cigars, forwarded by the steamboat Glendale, from Cincinnati, to the defendants in error, who resided and did business in Memphis. They were landed on the wharf at Memphis, and delivered over to one of the city draymen by the clerk of the boat, to be carried to the consignee, Vaccaro, but never delivered to him. On the arrival of the boat the bill of lading was handed to Vaccaro, but no other notice given to him on the subject, and it does not appear by the case agreed that he, in fact, had any notice of the arrival of the boat, further than it might be implied from the receipt of the bill of lading. The boat landed at the port on Sunday, and on the next day she was unloaded, and the cargo turned out upon the wharf at the usual place of landing, and the goods in question placed in charge of a drayman, as before stated. There is no evidence that Vaccaro was cognizant of any of these facts, or that any authority was given by him for that mode of delivery, except it may be implied from the usage of the port.

The case was presented by agreement to the court below upon the facts and the law. About the facts there is no dispute, as they are clearly set forth by the parties in the form of an agreed case, and are substantially, so far as they are material to raise the questions of law, stated above.

What shall be a sufficient delivery to discharge a common carrier by water has given the courts some difficulty in all commercial countries.

The general rule as to carriers is, that they shall deliver goods intrusted to them to the bailor, or consignee, his agent, or as he may otherwise be directed: 1 Parsons on Cont. 658, 660.

As to the most important class of carriers by land, railroads, it is the usage, founded on necessity, as they cannot leave their rails, to deposit freight intrusted to them in their station warehouses; but the owner or consignee must be notified: 1 Parsons on Cont. 663.

Upon the same necessity, to some extent, as the steamboat or ship cannot leave the water, a usage has ripened into law that a delivery upon the wharf at a public port, with notice to the consignee, will excuse the carrier by water. When there is a contract for any particular mode of delivery, that will, of course, govern. But when the place and consignee are designated, and nothing more, the rule is that the delivery must be made to the owner, consignee, or some authorized agent, or safely landed upon the wharf at the designated place of destination or delivery, and prompt notice to the consignee: 1 Parsons on Cont. 669, and note z. If the goods are delivered to a drayman, cartman, or any one else not authorized by the consignee to receive them, it is at the risk of the carrier.

The rules prescribed by the commercial and maritime code for ocean trade and foreign ports may be different, and more favorable to the carrier as to the mode of delivery, but for the internal coasting and river trade of our country, the rule stated above must govern and regulate the liability of the common carrier: *Kohn v. Packard*, 3 La. 224 [23 Am. Dec. 453], cited by Parsons in note z.

The authorities are not in harmony in relation to the duty of the carrier in the coast or river trade. The case of *Ostrander v. Brown*, 15 Johns. 89 [8 Am. Dec. 211], seems to require an actual delivery to the consignee to discharge the carrier from responsibility. But the conclusion of Mr. Parsons, that a delivery at the usual place at the port to which the goods are directed or consigned, with the knowledge of the consignee, by notice or otherwise, we think most reasonable, and better supported by authority. To require personal delivery would, in many cases, be impracticable, and if not so, would operate seriously on the general interests of trade and speedy transportation. There can be no injury to the consignee with proper diligence and attention to his interest, where the goods

are delivered at the proper wharf or landing, if he has knowledge of the fact. But without this, the goods would be put in jeopardy, with great danger of loss.

But even upon this relaxed rule of accountability, how does this case stand? There is no sufficient evidence that the consignees had any knowledge of the arrival of the boat and the landing of the goods. The delivery of the bill of lading by the agent afforded no evidence that the boat had arrived, or the time when it would arrive. It would not amount to notice of the time, or raise any reasonable presumption of it. To excuse the carrier, and relieve him of his legal responsibility, notice must be given, or knowledge otherwise fixed upon the consignee; not only that the goods have been shipped, or are on the way, but that they are at the wharf, so that they may be taken charge of at once, and secured from hazard by the person interested. This important fact is not made out in the case before us, and therefore the defendants were properly held liable. The usage or custom of that port cannot be allowed to excuse notice; it is enough to give it the effect of dispensing with actual delivery to the consignee. Nor can the custom of delivering goods to public draymen have the effect of superseding the requirements of the law on this subject. That this consignee, and many others, had submitted to it before, when no loss occurred, would not bind them to yield their legal right to notice when it became their interest to assert it. Such a custom cannot change the law in that respect.

A question is made as to the measure of damages. The court allowed the value of the goods at Memphis instead of their cost at Cincinnati. There was a difference of one hundred dollars. At the latter place, it is agreed they were worth or cost five hundred dollars, and at the former six hundred dollars. Where a carrier makes a wrong delivery, or fails to deliver, so as to become liable, "the net value of the goods at the place of delivery is the measure of damages:" 2 Parsons on Cont. 468; *Watkinson v. Laughton*, 8 Johns. 213; *Armory v. McGregor*, 15 Id. 24 [8 Am. Dec. 205]. The case of *Edminson v. Baxter*, 4 Hayw. 114 [9 Am. Dec. 751], is not in conflict. That case prescribes the measure of damages to be the value at the place of reception, and not delivery; where there is no fault or neglect, but admits it would be different where these exist.

The judgment will be affirmed.

PERSONAL DELIVERY OF GOODS BY CARRIERS BY BOAT IS SOMETIMES DISPENSED WITH, and notice to the consignee of the arrival and place of deposit takes the place of personal delivery: *Fisk v. Newton*, 43 Am. Dec. 649, and note 650.

RESPONSIBILITY OF COMMON CARRIER BY WATER CARRIERS AND TRANSIT ENDS when the goods are delivered into the custody of the wharfinger upon the wharf, in due course of business: *F. & M. Bank v. Champlain Trans. Co.*, 56 Am. Dec. 68.

WHETHER COMMON CARRIER IS BOUND TO NOTIFY CONSIGNEE OF ARRIVAL OF GOODS, see *Porter v. Chicago R. R. Co.*, 71 Am. Dec. 286, and note 290.

DEMENT v. STATE.

[2 HEAD, 506.]

IMITATION OR RESEMBLANCE MUST DECEIVE PERSONS OF ORDINARY OBSERVATION in order to sustain a conviction for passing a counterfeit bank note.

INDICTMENT for passing counterfeit bank note. Defendant appeals from a judgment of conviction. The opinion states the facts.

Sneed, attorney-general, for the state.

By Court, MCKINNEY, J. The prisoner was convicted in the circuit court of Obion, and sentenced to three years confinement in the penitentiary, for the supposed offense of passing a counterfeit bank note.

The indictment charges that the note was the counterfeit resemblance or imitation of a genuine ten-dollar bank note issued by the Bank of Tennessee.

The proof shows that the note passed, a copy of which is set out in the indictment, was in fact a genuine note, issued by the president, directors, and company of the Bank of East Tennessee, but altered by the erasure of the word "East."

The court instructed the jury, in substance, that it would be sufficient to support the charge in the indictment if the note passed by the prisoner was such a resemblance of a ten-dollar note of the Bank of Tennessee "as might probably be passed off on a careless and negligent person," although it might not be, "in many respects," exactly like the genuine note. This was stating the rule applicable to such cases too strongly. The correct rule is, that the imitation or resemblance must be such as to be capable of imposing on persons of "ordinary observation."

Such is not the character of the note in question. In a legal

sense, it bears no resemblance to a genuine note of the Bank of Tennessee, and no one of "ordinary observation" could be deceived or imposed on by it.

The indictment contains no count for forgery.

The judgment is erroneous, and it will be reversed, and the prisoner be remanded for a new trial.

RELFE v. McCOMB.

[3 HEAD, 558.]

LIENS OF SEVERAL JUDGMENTS RENDERED AT DIFFERENT TERMS AGAINST SAME DEFENDANT HAVE NO PRIORITY OVER EACH OTHER as regards property, the legal title to which is acquired by defendant after all the judgments have been rendered, and such fund must be distributed amongst them *pari passu*.

APPEAL from a judgment allowing the judgments of previous judgment creditors to be satisfied in preference to appellant's.

Ayres, Yerger, and Eldridge, for the plaintiffs in error.

J. G. Finnie, for the defendant in error.

By Court, MCKINNEY, J. This was an agreed case made in the court below. The facts are these:

The plaintiffs are the separate judgment creditors of the defendant, McComb.

The judgments were all rendered in the common-law court of the city of Memphis, but at different terms of the court. The judgment of Johnson was obtained at the March term, 1857, for three hundred and sixty-four dollars.

The judgment of Roberson & Dennett for one thousand one hundred and ninety-nine dollars and twenty-four cents, and also the judgment of Macy & Sons for nine hundred and two dollars and thirty cents, were obtained at the November term, 1857.

And the judgment of Relfe & Co. for two hundred and sixty-nine dollars and thirty-seven cents, and the judgment of Greenwood for six hundred and forty-nine dollars and thirty cents, were obtained at the March term, 1858.

At the respective dates of these several judgments the defendant, McComb, it seems, had no property subject to execution at law. He was the owner, however, of an equitable interest in certain real property, which, prior to the rendition of any of said judgments, had been conveyed by deed of trust for the benefit of other creditors. And on the twenty-fifth of

April, 1858, he procured a reconveyance to himself of the legal title to said real property. Immediately thereafter executions upon the several judgments before mentioned, all tested of the same term—March term, 1858—were issued and levied on said real property; and the same was sold by the sheriff on the twenty-sixth of June, 1858, for the sum of one thousand three hundred and sixty dollars and fifty-four cents.

This fund being inadequate to the satisfaction of all the above-mentioned judgments, the question is, How shall it be applied?

It was held by the circuit judge that the creditors were entitled to the fund according to the priority of their respective judgments.

This was not the correct principle. No lien upon the property existed at law in favor of either creditor previous to the reconveyance of the legal title on the twenty-fifth of April, 1858. And the moment the legal title was reinvested in McComb, the liens of the several judgments attached together upon the property at the same instant. This being so, no priority of satisfaction can be claimed by either over the others; all stand upon exactly the same footing, as respects the proceeds of the sale of said property; and the plain principle of reason and of law in such case is that the fund shall be distributed amongst them all *pari passu*. Neither is entitled to any preference; and it is ordered accordingly: *Davis v. Benton*, 2 Sneed, 665.

Judgment reversed.

ELROD v. LANCASTER.

[2 HEAD, 571.]

SETTLEMENT OF ESTATE BY DECREE IN CHANCERY does not bar a bill seeking to reopen the account of the executor on the ground of fraud when the interests of infants were involved in the settlement.

SALE OF REAL ESTATE OF DECEDENT is not invalidated because the petition for such sale is in the name of the guardian of the minor heirs, nor because the guardian became the purchaser thereof.

APPEAL from decree setting aside executor's account. The opinion states the facts.

M. and H. Brown, for the complainants.

Stephens and Stephens, for the defendants.

By Court, CARUTHERS, J. The father of complainants died in Jackson, in 1839, leaving a will, with defendant his executor, and a large estate. The will was proved and executed by the defendant. The deceased had been a merchant for a number of years, and had succeeded in accumulating an estate of fifty or sixty thousand dollars. The most of his fortune consisted in money and choses in action, and the settlement of the business was necessarily slow and troublesome. There were a vast number of small debts, and the ultimate loss by insolvencies was very great, probably thirty or forty thousand dollars. The testator left a wife, and six children, all of whom were then, and four of them yet, under age. The widow married Barr, and on the twenty-fourth of January, 1845, they filed their bill in the chancery court against the executors and the children, the latter all then being minors, for the settlement of the estate, so far as to obtain the part to which they were entitled under the will, which was one equal seventh in the event of marriage. In that suit an account of the estate was taken, and the part of the complainants paid over, and the balance retained by the executor in his new character of guardian, which he assumed at the request of the mother of the children soon after the decree. After that he made his reports and settlements, as guardian, in the county court.

In 1850, certain real estate was sold upon the petition of Lancaster and Lyon, who had then become guardians of the oldest son. Some, and perhaps most, of the property was bought by one or other of the guardians. This bill was filed on the third of March, 1854, for two main objects: 1. To have a general account and settlement of the estate, both as executor and guardian, against Lancaster, charging various specific abuses of his trust; 2. To set aside the sale of the lots in Jackson, and recover them back, with rents.

As to the first ground, in addition to the general and specific denial of the charges, the defendant relies upon the settlement and decree in the chancery suit of 1845, as a bar to this bill, so far as it seeks to reopen his accounts as executor. We are not prepared, under the circumstances, to give it that effect, except as to Barr and wife. The other complainants were all infants, and the object of the proceeding was not to assign to them their parts of the estate, but only to obtain the one seventh of the complainants', and leave that of the minors where it was. A settlement of the whole administration was only necessary for that purpose. It is true that a decree be-

tween defendants will be conclusive under certain circumstances and in proper cases, where an antagonism exists between them, so as to make them actors against each other. But we do not regard this as such a case. Against all the rules of propriety the executor was appointed to act as guardian *ad litem* for the infants, they having no general guardian at that time. Their interests and his were directly in conflict, and the substance of it was that he assumed to act for them against himself. The fact that his appointment was recommended in the bill can make no difference. It all seems to have been a hurried proceeding, got up by himself. The bill was filed on the twenty-fourth of January, 1845, on which day he was appointed by the clerk and master guardian *ad litem*. But his answer, as executor, was prepared and sworn to on the twenty-third; and on the same day, prior to the filing of the bill and before his appointment, his answer as guardian referring to, and admitting to be correct, his answer as executor, was drawn up and sworn to. All this by the same solicitor. Great confidence existed between the parties, and it may be that no wrong was intended. But we cannot permit a decree made under such circumstances to compromit the rights of the infants.

That is not, therefore, in the way of the relief now sought. It may be further observed that this defense is not set up in the answer with that precision and particularity which seems to be required by the rules of equity pleading on this subject. But whether that objection alone would prevail under the present relaxation of the rules of pleading we need not say, as we consider the other ground sufficient.

Much proof has been taken to show that, independently of the settlement in the chancery suit upon the merits, there are no grounds for the account demanded in the bill. That is a matter to be determined by reference to the master. We think the principle settled, and ever since acted upon, in the case of *Turney v. Williams*, 7 Yerg. 212, must govern this. The construction given in that case, and the case of *Burton v. Dickinson*, 3 Id. 112, of the act of 1822, c. 31, we think correct. The settlements made by the proper authorities, when infants are concerned, are not in the nature of settled or stated accounts, so as to require surcharging and falsifying before they can be opened, but only *prima facie* correct, and may be opened for a general account. They are, however, *prima facie* evidence for the executor in taking the general account, but nothing more.

We are of the opinion that that part of the chancellor's decree ordering a general account of the administration is correct, and affirm it to that extent.

But on the second question, we think he erred in setting aside the sale of the lots in Jackson. There are but two objections made to it.

1. That the petition is in the name of the guardian, and not the minors. It is in these words: "Your petitioner, Samuel Lancaster, as guardian for Samuel, James, Mary Eliza, and Sarah Jane Elrod, and James S. Lyon, guardian for Austin Elrod, minor heirs of James Elrod, deceased," etc. The case is fully set forth, with the reasons for the sale, in the petition signed by an attorney. The reference, proof, reports, and decrees are in strict conformity to the requirements of our decisions. The heirs were all then under age; but two of them, after arrival at age, by petition and orders of the court, fully recognized this proceeding, and took benefits under it. We think there is nothing in this objection to avoid the sale, and simply refer to the recent case of *Winchester v. Winchester*, 1 Head, 460, decided at the last term at Nashville, for the principles which govern it.

There is nothing in the second objection, as held by this court in the case of *Blackmore v. Shelby*, 8 Humph. 439. The court there say that in sales made by a court of competent jurisdiction, "the guardian may purchase, and although his conduct will be watched with jealousy, yet, if it be manifest that he acted fairly, with the utmost good faith, and the transaction is free from any imputation of design on his part to gain a benefit to himself, to the prejudice of the interests of his wards, such purchase will be held valid."

In this case there is every evidence of fairness and good faith. After the report of the sale a reference was made, and proof taken upon it, and the court held it was fair, the price full, and promotive of the interest of the heirs.

So much of this decree as annuls the sale of the lots will, therefore, be reversed, and that ordering a general account affirmed.

The case will be remanded for taking the account according to the rules of law and the principles stated in the decree, both as to the executorship and guardianship. Barr and wife will only be entitled to an account for matters since the decree of 1845.

TO RESETTLE EXECUTOR'S ACCOUNT on the ground of fraud, the executor should be cited to account in the probate court: *Jennison v. Haggood*, 19 Am. Dec. 258.

CONCULVENIENS OF SETTLEMENT OF EXECUTOR'S ACCOUNT BY PROBATE COURT: See note under *Sever v. Russell*, 50 Am. Dec. 813.

NEELY v. MORRIS.

[2 HEAD, 598.]

PROTEST MUST BE MADE BY NOTARY FOR COUNTY in which bill or note is payable, and a protest made by a notary from another county is void, as his authority is confined to the county for which he is commissioned.

INDORSEMENT IN BLANK TO SEVERAL PERSONS enables them to sue jointly, without proving that they are partners, or that the bill was indorsed or delivered to them jointly.

INDORSEMENT OF BILL TO FIRM requires the parties suing on it to show that they constitute the firm.

ASSUMPSIT. The opinion states the facts.

J. R. Fentress, A. T. and J. R. Robertson, and H. Brown, for the plaintiff in error.

Payne and Unthanks, for the defendants in error.

By Court, MCKINNEY, J. This was an action of *assumpsit*, founded on a promissory note for three thousand eight hundred and five dollars and thirty-five cents, made by the Mississippi Central and Tennessee Railroad Company, payable to R. P. Neely, and by him indorsed to the defendants in error. The suit is against the maker and indorser jointly. Pleas, *non-assumpsit* and payment. Judgment in favor of the plaintiffs against both defendants. To reverse which judgment, Neely, the indorser, for himself, has brought the case to this court by writ of error.

The principal error insisted on is the admission of the protest and certificate of the notary, as evidence to the jury.

The note was indorsed in blank, and the address of Neely, the indorser, was written underneath his name, thus: "Bolivar, Tennessee."

The protest shows on its face that A. Woodward, the notary, was a notary public for the county of Shelby. That at the request of Morris, Tanner, & Co., he presented the note for payment at the office of R. P. Neely, president of said railroad, in Bolivar. And he certifies that he left a written notice

of protest at said office, addressed to Neely, who was absent. This protest was a nullity. Under our statute, the authority of a notary public is confined to the county for which he was appointed and commissioned: Act of 1835, c. 11. He has no more power or authority to do an official act in a different county than a justice of the peace or other county officer.

It is well settled, as a general principle, that protest of a bill or note must be made by a notary at the place of payment. In the present case, the place of payment was Bolivar, in the county of Hardeman—the address of the indorser on the face of the note, and the place of his residence. The protest should therefore have been made by a notary of Hardeman county. The protest purports, on its face, to have been made in the city of Memphis, the residence of the notary. But whether made in Memphis or in Bolivar is unimportant; in either case it is alike void: 3 Kent's Com. 120; Story on Bills.

The next error assigned is the refusal of the court to instruct the jury that it was incumbent on the plaintiffs to prove that they were partners, as alleged in the declaration, or had a joint interest in the note sued on. The court held that this was not necessary, as that matter had not been put in issue by the pleadings.

The rule upon this subject seems to be, that where several persons sue as indorsees of a bill, if the bill appears indorsed in blank, there is no necessity for their proving that they were in partnership together, or that the bill was indorsed or delivered to them jointly: Ch. Bills, 7th Am. ed., 393. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill: *Ord v. Portal*, 3 Camp. 239. And it is not incumbent on the plaintiffs, in such case, to prove their joint title to sue on the bill by showing that they were partners, or proving a transfer to them jointly: *Rordans v. Leach*, 1 Stark. 446.

But when a bill is payable or indorsed specially to a firm, it must be proved that the firm consists of the persons who sue as plaintiffs on the record: Ch. Bills, 394; *Machell v. Kinnear*, 1 Stark. 499; *McKinney v. Patterson*, 10 Humph. 493.

There is some confusion in the bill of exceptions upon the point whether the indorsement of the note in question was made in blank, or specially to the firm of Morris, Tanner, & Co. But from the whole record, it is apparent that it was in blank, and most probably was filled up during the trial. This

point was therefore decided correctly. But on the other ground the judgment must be reversed.

BY WHOM PROTEST SHOULD BE MADE: See note under *Dupré v. Richard*, 43 Am. Dec. 217.

WARE v. STREET.

[3 HEAD, 608.]

PAYMENT IN GENUINE BANK NOTES CIRCULATING AS CURRENCY IS BINDING, and the loss falls upon the receiver where the bank suspends immediately after payment.

PAYMENT IN BANK NOTES CIRCULATING AND RECEIVED AS MONEY, there being no fraud, cannot be avoided by demand, refusal, and notice of tender to the payor, bank notes not standing on the same ground with negotiable paper.

ASSUMPSIT. The opinion states the facts.

W. P. Wilson, for the plaintiff in error.

Wickersham and Beecher, for the defendants in error.

By Court, **CARUTHERS, J.** Street & Co. commenced suit by warrant before a justice of the peace against Ware on an account of one hundred and ninety-one dollars for merchandise. The only controversy was upon a payment of one hundred dollars upon the twelfth of July, 1858. This is not disputed; but it is insisted it should not have been allowed, because the payment was made in notes upon the Citizens' Bank, which suspended on the next day, and the notes became worthless.

The proof is not sufficient to fix upon Ware any knowledge that the bank was broke, or that it had suspended or was about to suspend. He lived forty miles from Memphis, and it is not probable he knew as much about the condition of the banks as the plaintiffs, who were merchants in that city. The facts relied upon to fasten knowledge upon him are not at all sufficient for that purpose; and so the question of fraud is out of the case.

The proof shows that the bank did business on that day to the close, and did not suspend until the next day. It seems, by the evidence of the clerk, that it was resolved upon that evening, but not made known. The payment in question was made by the agent and son-in-law of the defendant, late in the evening of the twelfth, and a receipt taken. The plaintiffs made demand at the bank in Memphis next day, and no-

tified the defendant that the payment should not stand, and the credit was canceled upon the books. The notes were tendered in a few days to the defendant, and he refused to receive them, but insisted upon the credit.

The loss must fall on one of two innocent men, and the law must control it. At the time the payment was made, the notes were circulating as currency, and considered good by the community; but they were in fact of no value at the hour they were paid out, although a few hours before they were convertible into specie. A payment in genuine bank notes supposed by both parties to be good, though in fact worthless, will be binding, and the loss must fall upon the receiver, in the absence of fraud. It is otherwise if the notes be not genuine—not what they purport to be. So a payment in forged or counterfeit paper would be void, and have no effect as a credit or payment for property or pre-existing debts.

But it is contended that, by the same case, a payment good under the above rule may be avoided by presenting them to the bank where they are payable, and a refusal to pay, with notice to the person from whom they were received. But even if that were the law, the court erred in relation to the proper place for the demand. The notes were payable at the branch of the Citizens' Bank at Knoxville; but they were presented at the principal bank at Memphis. The charge made this sufficient, and that was fatal to the defendant, by avoiding the payment. To this the defendant excepts as error. We have heretofore held, in a recent unreported case, that where a demand for any purpose is necessary, it must be made at the place where the notes, upon their face, are made payable. So there was no legal demand here, and the payment was binding upon the parties, on the principle first stated.

This is decisive of the case, and other objections might not be noticed. But another error exists in the charge, equally fatal to the case, and is one of practical importance, and perhaps ought now to be decided, as it fairly arises. That is, as to the effect of a payment made in bank notes, under the circumstances stated. His honor, in his charge, adopted the *obiter dictum* of the court in the case of *Scruggs v. Gass*, 8 Yerg. 175 [29 Am. Dec. 114], and placed a payment in bank notes on the same ground as ordinary promissory notes or bills, so that recourse could be had upon them, or the payment avoided, in case of presentation and refusal to pay, etc.

We think such is not the law; but that a payment without

fraud, in bank notes circulating and received as money, cannot be avoided by demand, refusal, and notice or tender to the payor. It would be most unreasonable and inconvenient to hold otherwise.

The supposed commercial interest of our country, and the general convenience of the people, have produced a course of legislation by which the bank paper has become the circulating medium and the standard of value, instead of specie. True, it has not been made a lawful tender, and cannot be, without a change of the constitution.

But by almost universal consent, it has become the medium of exchange and the representative of property. It has taken the place of the precious metals, and is regarded as money. This, however, is by consent, and not by law. No man is bound to receive it in payment of debts, or for property. But if it gets into his hands by consent, and a loss comes by the failure of the bank, the misfortune must and should be his in whose hands it happens to be at the time. The risk must follow the paper, and not the former owners. It passes from hand to hand without recourse, except in cases of fraud or concealment, as before explained. Upon no other ground can the payment be avoided.

The judgment must be reversed, and a new trial awarded, when the law will be charged as laid down in this opinion.

LONA FIDE PAYMENT IN NOTES OF BANK WHICH HAS FAILED, neither party having knowledge of the failure, is good and discharges the debts *Bayard v. Shunk*, 37 Am. Dec. 441, and note 449.

PAYMENT BY BILLS OF BANK THAT HAD STOPPED PAYMENT at the time it was made does not extinguish the debt, although both the persons who paid and the person who took the bills were then ignorant of the failure of the bank: *Wainwright v. Webster*, 34 Am. Dec. 707.

PAYMENT IN BADLY DEPRECIATED BANK BILLS is not payment: See *Gutman v. Peck*, 34 Am. Dec. 702, and note 704.

STATE FOR THE USE OF ARNOLD v. LINAWEAVER.

[3 HEAD, 61.]

SERVICE OF GARNISHMENT ON ONE MEMBER OF FIRM indebted to the defendant in execution, is notice to all members of the firm, and such firm as garnishee is not discharged from liability to the execution creditor by reason of payment of the debt to the debtor by a partner who was ignorant of the service of the garnishment.

EXECUTION CREDITOR IS LIABLE FOR COSTS OF GARNISHMENT successfully prosecuted against the person summoned, if the funds in the latter's hands are not sufficient to pay the debt and costs, and he has not resisted the proceeding nor appealed from the judgment against him.

GARNISHMENT. The opinion states the facts.

T. D. Arnold, for the plaintiff.

Deaderick, for the defendant.

By Court, *CARUTHERS, J.* A *fi. fa.* from the circuit court of Washington county, in favor of the state of Tennessee for the use of Thomas D. Arnold, against Furguson, Green, Clark, and Crawford, for one hundred and nineteen dollars and seventy-one cents, was placed in the hands of the sheriff on the second of March, 1859. The return was, no property found, but that John B. Linaweaver was garnished as the debtor of Clark, one of the defendants in the execution. At the next term he appeared, and upon his examination made the following statement, which was reduced to writing:

"W. T. Battles and myself purchased a horse of J. P. Clark for one hundred dollars, which we drove off south, and owed him for the same at the time I was garnished. We went together with horses to sell. Battles paid the debt to Clark after his return, without my knowledge. I returned first. I wrote to Battles I was garnished before his return a short time. I don't know whether he received my letter; and he paid the note to Clark after his return, before I saw him. After he had paid the debt, I saw him and told him I was garnished, and would hold him responsible, if I had it to pay, for his portion. Battles did not say anything about the letter I had written to him, nor did he say he did or did not know I was garnished. Some three weeks or more since, I had the foregoing conversation with Battles, and it was only a short time before he paid the money, and he had not been long back from the south. He came back near the first of May. We had a settlement at this time, and I had lifted more of our notes than he had. We had previously given a number of joint notes for horses we had bought in partnership. I told Clark the next morning after I was garnished about it."

This is the entire statement, and the court thought it did not make out a case of liability, and discharged the garnishee; from which judgment this appeal was taken by the creditor. We think his honor erred in this conclusion. It does not appear upon what ground he based his opinion, but it is sustained

in argument upon the ground that as the garnishment was not served upon Battles, and it is not shown that he had any notice of the proceedings, he could, as partner, safely pay the debt of the firm to Clark, and thereby defeat the garnishment. Though this position may be plausible, we think it unsound. It was the debt of the two as a firm, and was subject to appropriation to the creditors of Clark by this mode of proceeding. The moment the garnishment was served, the debt, being then due, passed out of the control of both the debtors and creditor, and, so to speak, was in custody of the law. Notice to one partner would bind both, and neither could avoid the binding force of the garnishment. The money of Clark in the hands of the firm was attached, and could not be extricated by one member of the firm more than the other. The debt was seized in a legal mode, and Clark had no longer any right to receive it, and a payment to him would have no more effect to relieve them than if it had been to any other person. The law had made them the debtors of the plaintiffs in the execution, instead of Clark. Battles was bound to know that his partner had become bound by law to pay the debt to others, and not to Clark, in which event he would be no longer their creditor, and consequently a payment to him would be no discharge. It is the same thing as if he had paid the debt to Clark, after it had been previously discharged by his partner. The attachment of the debt by the creditors of Clark, substituted them to all the rights of the latter, and deprived him of any authority to receive the money, as fully as if it had been once paid to him by the garnished partner. The effect of the garnishment was to bind the debt, and place it out of the power of the parties; no change could affect the creditors, as their right to the money was fixed by law, upon the state of facts at the date of service.

Independent of this view, which we think conclusive against the defense made, the circumstances pretty clearly show that Battles must have known of the existence of the garnishment, if that were necessary, and fraudulently attempted in this way to defeat it, and favor Clark. But let that be as it may, upon the other ground, we are of opinion that the judgment should have been against the garnishee. The partners will be left to adjust their rights as best they may, for this double payment of the debt. With that we have nothing now to do.

The judgment will therefore be reversed, and judgment rendered here against the garnishee for the proper amount.

Since the disposition of the above case, a question has arisen upon the proper disposition of the costs of the garnishment, which it may be of some importance in the practice to settle. By the code, sec. 3102, "the garnishee shall have the pay and be entitled to the privileges of a witness, and shall recover cost against the plaintiff, if the garnishment is not successfully prosecuted."

This would seem to imply that if the plaintiff was successful in rendering him liable that he should pay costs. This section is, in substance, or was, doubtless, intended to adopt the act of 1826, Car. & Nich., c. 17, p. 364. Under that act this court held, in *Huff v. Mills*, 7 Yer. 42, 46, the garnishee was not subject to costs, although the judgment was against him, but that the plaintiff in the execution should pay them. We think there was no intention to change that rule by the code. The justice and reason of the case accord with that construction. The garnishee is in no fault. He could not pay the debt he owed the execution debtor to his creditor, without the judgment of a court. He fairly discloses the facts which establish his liability, and submits to the judgment of the court. It is nothing to him to whom he pays the debt, provided he does it according to law, so as to get a legal discharge.

The whole proceeding and the result is for the benefit of the execution creditor, and it is right that he should pay the cost, rather than the garnishee, who is in no wrong. The execution debtor cannot be taxed, because he is not a party to the proceeding. We think it right to adhere to the rule established in the case of *Huff v. Mills*, 7 Yerg. 42, under the act of 1826, as we think it just, and the code does not change it. How it would be if the garnishee had resisted and appealed from a judgment against him, or if the fund in his hands was more than sufficient to pay the execution and cost, we need not now say, as that is not the case in judgment.

The costs of both courts will be taxed to the garnishing creditor.

BEELER v. DUNN.

[3 HEAD, 57.]

FOREIGN EXECUTOR OR ADMINISTRATOR CANNOT BE CALLED ON for an account of his administration in the courts of Tennessee. But if he comes within the jurisdiction of these courts, bringing with him funds or property belonging to the trust estate, he may be held to account to that extent, in the character of a trustee for those entitled to the effects in his hands.

INCOME OF ESTATE IN GUARDIAN'S HANDS IS PROPER FUND for support and education of ward; if such fund be insufficient, a court of chancery may authorize the guardian to encroach upon the principal; but without such power the guardian has no authority so to do.

WHETHER UNAUTHORIZED ACTS OF GUARDIAN IN BREAKING INTO CAPITAL of ward's estate for the latter's support and education, where the interest of such estate was insufficient for the purpose, will be protected and confirmed, if the acts clearly appear to have been for the best interest of the ward, and such as the court would have authorized, *quære*.

BILL for accounting. The opinion states the facts.

Trewhitt and Hoyle, for the complainants.

Gaut and Cooke, for the defendant.

By Court, McKINNEY, J. The complainant Mary Beeler is the daughter of William A. Cameron, who died in Forsyth county, Georgia, of which state he was a resident in February, 1839. Administration with the will annexed on the estate of said Cameron was granted to the defendant by the court of ordinary of said county of Forsyth, in May, 1840. The testator left a widow and two infant daughters of tender age—the complainant Mary, and a sister who is not a party to this suit. The defendant, near the time of his appointment as administrator, intermarried with the widow. In March, 1846, he removed with his family to Polk county, in this state, where he has since resided. After his removal here he was appointed guardian of said two minor children by the county court of Polk. The interest of said minors under the will of the testator is represented by the defendant to have been about one thousand dollars each. And by a final settlement, made in the court of ordinary of Forsyth county, in March, 1846, the share of each was reduced to five hundred and fifty-four dollars and sixty-two and one half cents; and with this amount defendant was charged, as guardian of complainant, upon his appointment in Polk county.

Complainant intermarried with Beeler in November, 1856. This bill was filed in May, 1858. The complainants charge

defendant with various acts of maladministration; they seek to surcharge and falsify the accounts and settlements of defendant, both as administrator and guardian, and pray that he may account for the entire estate as administrator, and also guardian.

No exception seems to have been taken to the jurisdiction of the court to grant the relief to the full extent prayed for. In his answer, the defendant denies the charges of maladministration; sets up and relies upon the settlement of his administration accounts in the court of ordinary of Georgia, and his discharge as administrator, granted by said court; he in like manner relies upon his settlements as guardian with the clerk of the county court of Polk, in bar of the relief sought by the bill. He substantially alleges in his answer that the entire fund belonging to the complainant Mary—both principal and interest—was properly expended by him, as guardian, in her maintenance and education. The chancellor declined to order an account; and not regarding the settlements as successfully impeached, and being of opinion that the fund in the hand of the guardian had been properly and fully accounted for by the defendant before the commencement of this suit, dismissed the bill.

So far as the bill seeks to impeach or to reopen the defendant's settlement of his administration accounts, in the court of ordinary of Georgia, the bill was properly dismissed. It is now too firmly settled to admit of discussion in our courts, that a foreign executor or administrator cannot be called on for an account of his administration in the courts of this state: *Lee v. George*, 6 Humph. 61; *Allsup v. Allsup*, 10 Yerg. 283; *Keaton v. Campbell*, 2 Humph. 224; *Patton v. Overton*, 8 Id. 192.

It is true, the authorities on this subject are at variance; and in some of the cases the contrary doctrine is maintained with much force. But we are not inclined to disturb a principle so long acquiesced in, and so repeatedly sanctioned by this court.

It is equally well settled, however, that if a foreign executor or administrator come within our jurisdiction, and bring with him funds or property belonging to the trust estate, he may be held to account here, to that extent, not in the character of executor or administrator, but as a trustee for those entitled to the effects in his hands.

Upon this principle, the fund in the hands of the defendant,

brought with him into this state, might have been reached. But having voluntarily taken upon himself the office of guardian here, the case is free from all difficulty; and he must account in that character under our law.

As regards the extent of the defendant's liability to account in this case, the decree is entirely erroneous.

The income of the fund, as well as the principal, was expended by the guardian in the maintenance and education of the infant. And the decree assumes that the guardian acted properly in doing so, of his own authority, without the previous sanction of a court of chancery, and therefore ought to be protected.

Upon this point, also, the authorities disagree.

There is no doubt of the power of a court of chancery to break into the principal, or to authorize a guardian to do so, where the fund is so small that the interest will not afford the means of a competent maintenance and education to the infant. But according to the current of authority, the guardian is not at liberty to break in upon the principal of the fund of his own authority. The income is the proper fund for the maintenance and education of the infant, and it is at the peril of the guardian or trustee if he exceed this. The fact that the income may be inadequate does not essentially vary the principle. The discretion to break into the *corpus* of the estate or fund is intrusted to the court and denied to the trustee. Thus far the authorities may be said substantially to agree. But according to some of the authorities, this general doctrine is subject to certain qualifications, one of which is that acts done by a guardian or trustee, of his own authority, which clearly appear to the court on inquiry to have been beneficial to the infant, and such as the court, on the application of the guardian, would have ordered to be done, will be protected: McPherson on Infants, 337, marg., and cases cited in notes.

On the other hand, it is held that the unauthorized acts of a guardian, in breaking into the capital of the estate without the previous sanction of the court, will not be protected or confirmed by the court. And this doctrine is maintained in the case of a trustee, under a deed of trust, in *Hester v. Wilkinson*, 6 Humph. 215-219 [44 Am. Dec. 303]; also *Phillips v. Davis*, 2 Sneed, 520-525 [62 Am. Dec. 472].

Without stopping to inquire whether the case of a special power given to a trustee in a particular case, under a deed of trust, is, from the very nature of the case, distinguishable

from that of a general guardian, and without expressing any opinion of our own as to which of the doctrines above noticed is the more reasonable in itself, or most strongly supported by authority, we are of opinion, upon the facts of the case, taking into view the value of the complainant Mary's services, her condition in life, and the kind of maintenance and education afforded her, that the encroachment upon the principal of the fund was improvident, unauthorized, and not to be sanctioned under the most favorable view of the law for the defendant. Hence he must account for the principal of the fund. And the decree will be modified accordingly.

LIABILITY OF EXECUTOR OR ADMINISTRATOR IN FOREIGN JURISDICTION to make account of his jurisdiction: See *McNamara v. Dwyer*, 32 Am. Dec. 627, and note citing other cases 632.

GUARDIAN'S EXPENDITURE OF MORE THAN INCOME OR INTEREST from ward's estate: See *Phillips v. Davis*, 62 Am. Dec. 472; *Villard v. Robert*, 49 Id. 654, and extensive note thereto 657-660, discussing this subject fully. The principal case is cited in *Cohen v. Skyer*, 1 Coop. Ch. (Tenn.) 194, to the point that if the guardian breaks in upon the capital, without the sanction of the court, he will not be allowed for expenditures so made unless good reason is shown why the court was not applied to for its sanction in advance.

JOHNSON v. BYERLY.

[8 HEAD, 194.]

PARTNER CANNOT MAINTAIN ACTION IN FIRM NAME TO RECOVER CERTAIN

FIRM MONEYS of a person to whom they were paid by another partner for the value of certain goods received by the latter with a knowledge of the fact that they were stolen, though such payment was made in order to prevent a prosecution of the latter for felony, and without the knowledge or consent of his copartner.

ACTION for money had and received. The facts are stated in the opinion.

O. P. Temple, for the plaintiff in error.

Wallace and Baxter, for the defendants in error.

By Court, CARUTHERS, J. Byerly & Owens brought this suit against Johnson for two hundred and fifty dollars illegally paid to him by Owens out of the money of the firm. They recovered, and the case is brought up by Johnson upon supposed errors in the charge of the court.

Johnson carried on a large tannery near the place of business of Byerly & Owens. A good deal of his leather was

stolen, and he traced it to the store of defendants, where it seems it had been received by Owens, who conducted the business of the firm, from a slave, knowing that it was stolen. He charged Owens with the crime, and perhaps threatened him with a criminal prosecution. Owens admitted his guilt, and agreed to pay Johnson two hundred and fifty dollars, the supposed value of the leather, to keep the matter secret, and refrain from prosecuting him. It is not certain whether a note was first given and then paid off, or the money was paid in the first instance; but that is not material. But that it has been paid and received there is no dispute, and that it was the money of the firm there can be but little doubt. When the facts came to the knowledge of Byerly, this action was instituted in the name of the firm to recover back the money.

The law was charged in favor of the action, and there being no dispute about the facts, a judgment was recovered for the two hundred and fifty dollars. The court was asked to charge that if the facts were such as to repel Owens on account of the illegality of the transaction in compounding a felony, the joint action could not be maintained. But he refused, and held that if Owens paid out the firm means upon such illegal contract, without the knowledge, concurrence, or sanction of his partner, an action would lie in the name of the firm to recover it back.

Of course, it is not controverted on any hand that no suit would be entertained, of Owens or Johnson, upon any matter arising out of the transaction in any court of justice, because they were parties in the violation of law, by compounding a felony, and are equal in the guilt. This has been too often held by our own and all other courts, to be now open to controversy. But it is insisted that the same rule does not exclude from the courts the innocent partner, where the funds of the firm have been thus illegally abstracted by his copartner; and that in such a case, the name of the guilty party may be united in the suit as a member of the firm.

In support of this charge, we have been referred to authorities to show that any illegal use or misapplication of the means of a firm, or fraudulent use of its name and credit, by one member, is not binding upon the others, and they may defend themselves against it, or assert their rights by joint action or defense. But all that is entirely foreign to the turning question in this case. The authorities make it very clear that illegal or unauthorized contracts entered into in the name

of the firm by one of its members cannot be enforced against it. No one would think of controverting that, but that is not the question now. It would be, if Johnson had sued upon the note that was said to have been given in the first instance by Owens for the money. In that case, he would have been repelled, because of the taint upon the transaction; but that aside, he would have failed, because it was known by him to have been without the scope of the partnership business. But such is not this case. It is a suit by two partners to recover back money which one of them paid out of the firm money upon an illegal contract to compound a felony and defeat public justice. The contract was executed. The question is, not whether Owens had authority to make this use of the firm means, or whether his partner is bound by it, for upon that there could be no doubt; but having so used the money, can it be regained by suit? It would not be contended for a moment that Owens could maintain this suit if there were no partnership. No court would entertain a suit in favor of one whose hands were so stained. He has not only admitted his guilt of a felony, in receiving stolen goods, but has added the offense of compounding the felony. In such cases, the courts of justice will not contaminate themselves by entertaining a suit in behalf of either party, but leave them in the condition they have placed themselves, giving to the defendant that advantage which the principle of non-intervention secures to him. Not because his case is the better one, for they are equal in the violation of the law and public policy; but because he has the advantage of position merely.

But it is contended that Byerly is innocent, and that as the funds in which he was interested have been illegally paid into the hands of Johnson by his guilty partner, that he has a right to sue, and use the name of the firm, as he cannot sue for partnership funds in any other way. Such was the opinion of the circuit judge. We cannot concur in it. The plaintiffs must succeed or fail together. Byerly must take the consequences of his corrupt association. If one plaintiff must be repelled, the other must go with him; they cannot be separated. His partner is accountable to him for a misapplication of the firm means, but not the recipient of them, at the hands of a court, under such circumstances. This result is the less to be regretted in this case, because there is reason to believe that the leather, for which the money was paid out of the firm, went into the business, though without the knowledge, per-

hapse, of Byerly. To that, however, we give no consequence, but simply put the case upon the ground that if one partner, who is united in a suit as plaintiff, must be repelled on the ground stated, so must the other, though he be innocent of actual participation in the crime. We have been referred to no authorities on the precise point by either side, but such we understand to be the principle which must govern the case.

It might be added that upon another ground the plaintiffs must fail. The implied promise to repay the money, upon which the suit is based, has nothing to support it but the unlawful agreement and transaction in which it was received and paid, and therefore cannot be the subject of a suit: *Bates v. Watson*, 1 Sneed, 380.

The judgment will be reversed, and a new trial granted.

WARWICK v. UNDERWOOD.

[3 HEAD, 222.]

JUDGMENT IN ACTION OF TRESPASS QUARE CLAUSUM FREGIT IS CONCLUSIVE upon the parties to a suit and their privies, as to all matters put in issue in the suit, and either when offered as evidence, if admissible, or when pleaded in bar of a subsequent suit touching the same matters.

PAROL EVIDENCE IS ADMISSIBLE IN ACTION to show what was involved in the issue and settled by the judgment in a former action, if such judgment is general and uncertain.

WHETHER JUDGMENT IN ACTION OF TRESPASS QUARE CLAUSUM FREGIT, when the title is put in issue, is a bar to an action of ejectment for the same land, *quære*.

TRESPASS. The facts are stated in the opinion.

Crozier and Reese, and Maynard and Washburn, for the plaintiff in error.

Trigg, Hall, and Armstrong, for the defendant in error.

By Court, CARUTHERS, J. This was an action of trespass to his freehold, brought by Underwood against Warwick, in which he recovered a small amount of damages. The main contest was upon the title—that being the principal issue in the case, and the object of the suit.

The case is not fully presented to us, neither as to the facts proved nor the charge of the court, but it was only intended by the parties to state enough in the bill of exceptions to raise two questions of law upon the charge of the court.

The two parties owned adjoining tracts of land, and the question of difficulty in the case was, on which side of the dividing line between them the spring near said line, and where the trespass was committed by Warwick, was located. It was proved by the surveyor, and perhaps the fact is not controverted, if the line be run according to the trees called for as corners in Warwick's title papers, and along the foot of the ridge, as designated in the deeds, the spring would fall on Underwood's side, and that would support the verdict. Warwick bought of Johnson, he of Long, and Long of Prichard. Warwick adduced proof tending to show that there was a marked line varying from the calls of his deed, but in reasonable conformity to them, which was shown to him when he bought, and to his vendor before him, to which they claimed, and by which the spring would be thrown on his side of the line. The court was requested to charge that if this state of facts was established to the satisfaction of the jury, they should find for the defendant. But the court refused, and charged "that if the defendant's deed called for the foot of the ridge, he would be controlled by that, unless it was shown that Underwood and those he held under had recognized that line," so marked and claimed by Warwick and his vendors. There is no error in this. The calls in the deeds for natural objects would certainly have to prevail, although a different line had had been marked and claimed, unless it had been acknowledged or acquiesced in by coterminous claimants, when there was no actual possession. It is not a question of remarking, but the change of a line by the acts and understanding of one side, without the concurrence of the other.

This cannot be done.

The other question is in relation to the effect of a former trial and judgment between the same parties, with their position as parties reversed. In that suit, brought by Warwick against Underwood for trespass, at or near the same place, it was determined that the spring was on his side of the line, upon an issue on the plea of *liberum tenementum*, and he recovered damages.

It is insisted that this judgment was conclusive upon the title, and operated as an estoppel upon Underwood, and must defeat his present action. Upon that point the court charged "that if the spring in controversy in this case was described in the declaration in the former suit, the judgment in that cause would be conclusive that the title was in Warwick: but

that if the spring was not in the boundary *described in the declaration*, that the judgment in that case would not be a bar to this."

This instruction is as it was requested by Warwick's counsel, except the words in italics. To that qualification exceptions are taken by plaintiff in error. The title papers used in the former and present cases are the same, and so is the place of the trespass.

The court was right in holding the former judgment conclusive upon the same parties as to the title that was put in issue and tried in that suit as well as this, and the place of the trespass the same. This is well settled in our own cases, and we need not go beyond them for authority: 1 Meigs' Dig., sec. 907. By our cases, also, the vexed question upon which the decisions of other courts and opinions of writers are variant and conflicting, as to the different effect to be given to this defense when not pleaded, but only offered in evidence under the general issue, is put to rest. Judgments are held to be equally conclusive of the fact or point directly adjudged when offered as evidence, if admissible or if pleaded in bar as an estoppel: Same authorities.

But our cases also hold that where the former "judgment is general and uncertain, parol evidence is admissible to show the fact or issue tried and involved in the general judgment:" Same. Upon this rule, the only difficulty arises in the case before us. There was parol proof in this case tending to show that, in the former suit, the question of fact as to the location of the line by marks and acquiescence variant from the calls in the deeds, was tried and passed upon by the jury in favor of Warwick, upon an appropriate plea involving that issue, and consequently that fact was settled in the general verdict and judgment. It is not material on this point whether the finding of the jury was right or not in the former suit. That cannot be questioned any more between the same parties or their privies. Right or wrong, the question was finally closed, unless a new trial had been obtained in the same suit. This rule is not alone for the benefit of the parties litigant, to put an end to strife and contention between them and produce certainty as to individual rights, but it is also intended to give dignity and respect to judicial proceedings, and relieve society from the expense and annoyance of interminable litigation about the same matter.

The condition upon which the circuit judge gave finality to

the former adjudication defeated entirely the object of the rule. He said "if the spring was not in the boundary described in the declaration" of Warwick in the former suit, then "the judgment in that case would not be a bar to this." That was plainly opening the whole question of boundary again, because the jury would have to determine, by a re-examination of the facts, whether the spring was within the lines claimed by Warwick in his declaration in the former suit, in order to decide whether that judgment was a bar or not. That was the precise fact before tried and closed, and should not have been again opened. The charge should have been, that if, by the former verdict and judgment, the line between the parties had been found so as to throw the spring on the side of Warwick, Underwood was estopped from controverting that fact in this suit. It was not material to that question whether their finding was governed by the calls of the deed, or upon evidence showing that in some legal mode the dividing line was varied from the calls and located at a different place. The fact that the line was so found by the former jury was enough to give effect to that finding as a bar, without regard to the kind of evidence upon which it was done, or whether it was correctly done or not. But, by the charge, the jury were instructed to go back and ascertain if the previous jury had found the line described in the declaration in that case to include the spring; and if that did not, then, although the true line might have been found to vary from that described, and as thus found included the spring, it would not have the effect to close the question. This was all wrong.

There could not, perhaps, be a better case to illustrate the wisdom of the rule in question than the one before us.

Warwick sued Underwood for a trespass, and the titles were put in issue, and decided in favor of the plaintiff, and damages given for the injury to his freehold; then, and without delay, Underwood brings his action for a trespass upon the same land and place, and, by the verdict of a second jury, he turns the tables, and is allowed to recover damages against Warwick, upon the ground that the same land is his, upon the same title papers. What would be thought of the law and the administration of justice if this kind of game could be successfully played in the courts?

It is said that Underwood was not bound to show the strength of his title and his proof in the other suit on the question of freehold, or that he may have acquired a better

title since, and therefore should not be concluded. If that were so, all the evils intended to be avoided by the rule would continue to exist in an aggravated form. This would be trifling with the courts of justice, and cannot be tolerated. Every question raised by the issues in a case, or in some cases, all which might have been legitimate, are considered as closed by the verdict, and that forever, as to the same parties.

The maxim that there must be an end to litigation was dictated by wisdom, and is sanctified by age.

We do not say that a decision upon the title in trespass would be a bar or estoppel in ejectment; that question is not involved, and we leave it open for a case in which it may arise.

The judgment will be reversed for this error, and a new trial granted.

JUDGMENTS ARE CONCLUSIVE ONLY AS TO MATTERS PUT IN ISSUE IN SUIT: See *Ellis v. Clarke*, 70 Am. Dec. 603, and note 605; and upon parties and their privies only: *Whitney v. Higgins*, Id. 748, and note 754; and see a discussion of the whole subject in the note to *Doty v. Brown*, 53 Id. 355, 356. As to the effect of a judgment in an action of trespass on real estate, see *Freeman on Judgments*, 3d ed., sec. 310 et seq.

ADMISSIBILITY OF PAROL EVIDENCE TO SHOW WHAT WAS DECIDED BY JUDGMENT: See *Doty v. Brown*, 53 Am. Dec. 350, and note 356, citing many cases and discussing this question.

STATE v. PENNINGTON.

[3 HEAD, 299.]

EAVESDROPPING IS INDICTABLE COMMON-LAW OFFENSE, and consists in the nuisance of listening under walls or windows or the eaves of houses to hearken after discourse, and thereupon to frame slanderous and mischievous tales.

ONE IS GUILTY OF EAVESDROPPING WHO SECRETLY AND STEALTHILY approaches the room occupied by a grand jury, while they are engaged in performance of their duties, for the purpose of overhearing what is there said and done.

INDICTMENT for eavesdropping. The facts are stated in the opinion.

Head, attorney-general, for the state.

Mynott and Scott, for the defendant.

By Court, CARUTHERS, J. This was an indictment for eavesdropping. It was quashed by the circuit court, and the state appealed.

The charge is, that the defendant "unlawfully and stealthily did approach and come near to the room where the jurors aforesaid were then and there assembled for the purpose of considering and transacting such business as was properly before them as jurors, as aforesaid; the said jurors then and there being convened and assembled as a grand jury for the county of Scott, he, the said defendant, then and there being, as aforesaid, did unlawfully, for the purpose of listening to and overhearing what was then and there said and done, did then and there unlawfully and stealthily eavesdrop and listen to the proceedings in the room aforesaid, and was then and there guilty of the crime of eavesdropping, to the evil example," etc.

The court below was of the opinion that this indictment did not set forth an indictable offense, and quashed it

That eavesdropping is an indictable common-law offense was decided in this state at a very early day, in the case of *State v. Williams*, 2 Overt. 108.

Blackstone defines it thus: "Eavesdroppers, or such as listen under walls or windows or the eaves of houses to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance:" 4 Bla. Com. 168.

Bishop says: "It consists in the nuisance of hanging about a dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood:" 2 Bishop in Crim. L. 274.

The indictment was doubtless drawn up in haste, and if not void it is certainly without form. Yet it is easy to see from it what is the charge to be answered, and it is set forth with reasonable certainty.

We adopt the definition of the offense given by Blackstone as the true description of the offense, and by that test the present case.

The acts imputed to him in the presentment is, that he stealthily, that is, secretly or clandestinely, approached near to the room occupied by the grand jury, where and while they were engaged in the performance of their duties, for the "unlawful purpose of listening to and overhearing what was then and there said and done."

It is difficult to conceive of a more mischievous species of this offense than that now presented. The members of the grand jury are required, by their oath, to keep their counsels secret, and are not permitted to disclose their own acts. This

is a rule adopted upon the soundest policy. It produces free and unrestrained disclosures and consultations in relation to their duties, and saves them from persecution or injury from the violent and unprincipled, upon whom it may be their duty to inform, or against whom they may feel bound in the discharge of their duty to act or vote. But, in addition to these considerations, it is necessary for the ends of justice to keep their proceedings secret, so that information may not reach offenders of forthcoming charges against them, and thereby enable them to escape. All these evils, and more, would result from eavesdropping. If it be an indictable offense to clandestinely hearken to the discourse of a private family, by which only a private injury would be done, much more must it be to obtain, by the same unlawful means, the secrets of the jury-room. The same salutary principle must cover both cases, and for a much stronger reason the latter. If the one be a nuisance, much more is the other. The proceedings of juries, both grand and petit, are so important to the life, liberty, and property of the citizen that they cannot be too carefully guarded. Invasions of the sanctity of the jury-room cannot be too severely punished. No intrusions upon their deliberations can be tolerated. The courts are too remiss in the discharge of their duties on this subject. It cannot be that the law has made no provision for the punishment of offenses like this. We think it has, and therefore reverse the judgment quashing this presentment, and remand the case for trial.

EAVESDROPPING.—Eavesdropping, it has been held, is an indictable offense at common law: *State v. Williams*, 2 Overt. 108; *Commonwealth v. Lovett*, 6 Pa. L. J. 226. Blackstone says that "eavesdroppers, or such as listen under walls or windows or the eaves of houses to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and indictable as such:" 4 Bla. Com. 168. The offense, it seems, consists in listening, and not in peeping or looking privily, the latter being held not to be indictable: *Commonwealth v. Mengell*, cited in *Commonwealth v. Lovett*, 6 Pa. L. J. 228. It is held to be a good defense to the prosecution that the offense was committed by the husband of the prosecutrix who was the subject of it, or by his authority; for it is said that there is no law to prevent a husband from constituting a watch of his wife. On this topic, no other or later decisions are found; but in New York, in 1881, the legislature enacted that "a person who secretly loiters about a building with intent to overhear discourse therein, and to repeat and publish the same to vex or annoy or injure others, is guilty of a misdemeanor:" N. Y. Pen. Code, 1881, sec. 426.

ANDERSON v. STATE.

[8 HEAD, 455.]

SCHOOL-MASTER MAY ENFORCE Obedience to his RULES by use of the rod when necessary, but he must not chastise wantonly and without cause, and the chastisement must be proportionate to the offense and within the bounds of moderation, or the school-master will be liable for an assault and battery.

IN PROSECUTION for ASSAULT AND BATTERY, WHERE RELATION of school-master and scholar, parent and child, master and apprentice, or any similar relation is established as a defense, the legal presumption is that the chastisement was proper, and to warrant a conviction this presumption must be rebutted by showing that it was excessive, or without any proper cause.

INDICTMENT for assault and battery. The facts are stated in the opinion.

Hickerson, for the plaintiff in error.

Head, attorney-general, for the state.

By Court, CARUTHERS, J. We are asked to reverse the judgment in this case for errors in the charge of the court. It is an indictment against a school-master for an assault and battery upon one of his scholars. The facts proved, to which the charge had reference, are these: The scholar, Wyatt Layne, was a small boy, and had only been at the school one day before this occurrence. The offense for which he was chastised, with some severity, and all the attending circumstances, are thus detailed by the first witness, and are not materially varied by the other scholars, who were examined in the case on both sides.

John M. Gunn, about fifteen or sixteen years of age, says: "Anderson was hearing a class, and Wyatt Layne spoke out and said that 'four and one make five,' in a low tone of voice; that Anderson asked who it was spoke out. Layne said it was him; that Anderson called him up, and told him to stand there till he got through his class. Anderson asked him what he spoke out for. He said he spoke before he thought, and commenced crying, and said he would do so no more. Anderson told him to pull off his coat, that no excuse would do. He pulled off his coat. He hit him about a dozen licks with a switch about as large as his thumb or finger, and two or three feet long; struck him pretty hard, Layne crying all the time. Layne was a small boy, and was never at the school of defendant until the day before the whipping." He thinks that the

little boy had never heard the rules of the school. He says, further, that Anderson kept a silent, quiet school.

Some of the witnesses think only eight licks were inflicted, and that the boy spoke out loud.

Upon these facts, the defendant was clearly guilty of an illegal act. There was no sufficient cause for the whipping. The offense was very slight, and entirely unintentional. It was the first violation of the rules on the part of the little boy; he was a new scholar, that being his second day in the school, and his apology, repentance, and promise "to do so no more" ought to have saved him from the lash. The chastisement, under these circumstances, was not only cruel, but an unauthorized exercise of power. Cases like this are calculated to produce the deeds of violence against teachers which so often occur on the part of the parents and brothers of students.

The law has, very properly, guarded the rights of both parties, where this and similar relations exist. The authority given to the teacher must not be abused, but exercised with discretion and moderation. He must, necessarily, have the power to enforce obedience to his rules, and even to use the rod when necessary, but not wantonly and without cause. Nor must his chastisements be cruel or excessive, but reasonably proportioned to the offense, and in the bounds of moderation. It is of the first importance that the authority of the school-master should be firmly maintained, but still it must be kept within proper limits. The scholar being helpless, and in the power of his teacher, that power should be restrained, and not allowed to be wantonly abused with impunity. Where this is done, the courts must afford the proper redress, and prevent the temptation from being presented to parents and relations to take vengeance into their own hands. The government of a school should be patriarchal, rather than despotic. If it be a monarchy, it should be a limited one, and not absolute.

But the claim for a new trial is rested upon a supposed error in the charge. His honor read to the jury, as the law applicable to the case, the ninety-seventh section of 2 Greenl. Ev., and said in reference to this relation: "If Anderson chastised him, then to justify him he must, by evidence, establish some misbehavior on his part sufficient to justify the correction given."

Our first impression was that this proposition was erroneous. And so we would still regard it, if it is to be understood as stating the law to be that the burden of proving sufficient cause is

thrown upon the teacher, whenever an act of chastisement is established by the state, in order to justify it.

We think the proper rule is, that where the relation of school-master and scholar, parent and child, master and apprentice, or any similar relation is established in defense of a prosecution of this sort, the legal presumption is that the chastisement was proper; this must be rebutted by showing on the part of the state, or the proof before the jury, that it was excessive or without any proper cause. To hold a parent bound to prove that he had good cause to whip his child, or be subject to a conviction upon indictment, would be monstrous. The same rule applies to the relation under consideration.

But we do not understand his honor to say anything more than that in order to acquit the defendant it must appear in the evidence before the jury, showing all the facts of the case, that there was "some misbehavior" on the part of the boy "to justify the correction given."

If there had been nothing in the proof before the jury but the simple fact of whipping and the relation of the parties, we do not suppose that the able and accurate judge who presided in this case would have held that in order to make out his defense it would be required that he should show the cause of the chastisement, or that it was moderate. The proof of all the circumstances was before the jury, and it was only intended to instruct them that the defendant must show in the facts proved some misbehavior that would justify him for the punishment inflicted.

Without expressing any opinion on the law as laid down by Greenleaf in the section referred to in civil cases, we need only say that that, as well as the passage in charge upon which we have commented, were only abstractions in reference to this case as presented in the evidence before them, and could not have prejudiced the defendant. The full case, and all the facts connected with it, were before the jury, and the rules laid down could not have had the effect to mislead them in their conclusions upon the evidence.

Let the judgment be affirmed.

POWER OF SCHOOL-MASTER TO PUNISH, CORPORALLY, REFRACATORY PUPIL:
See *State v. Pendergass*, 31 Am. Dec. 416, and note 419, collecting the cases on this subject.

REED v. REED.

[3 HEAD, 491.]

MAN CANNOT BE TENANT BY CURTESY OF REMAINDER OR REVERSION expectant upon an estate of freehold, unless the particular estate be determined during the coverture.

MAN CANNOT BE TENANT BY CURTESY OF LANDS WHICH ARE ASSIGNED to a woman for her dower.

WHERE WOMAN ON WHOM LANDS DESCEND ENDOWS HER MOTHER, afterwards marries, has issue, and dies in the life-time of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed, because the daughter's seisin was defeated by the endowment.

APPEAL from Bedford county court. The opinion states the facts.

J. H. Neil, for the appellant.

E. and H. Cooper, for the defendants.

By Court, WRIGHT, J. William Cootes died intestate, leaving a widow and several children. He was seised of a tract of land in Bedford county, out of which his widow, Celia Cootes, was endowed, and in possession of which dower she remained until her death in 1857.

The petitioner, Andrew Reed, married one of the children of William Cootes, and she survived her father, but died before the death of the said Celia, leaving several children surviving her, who are also the children of petitioner, and born after the death of William Cootes.

The question is, whether Andrew Reed is tenant by the curtesy of his wife's share in the lands which were assigned to Celia Cootes for her dower. This question we answer in the negative. A man cannot be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless particular estate be determined during the coverture. Neither can he be tenant by the curtesy, of lands which are assigned to a woman for her dower. If a woman on whom lands descend endows her mother, afterwards marries, has issue, and dies in the life-time of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed, because the daughter's seisin was defeated by the endowment: 1 Greenleaf's Cruise on Real Prop., tit. Curtesy, c. 2, secs. 23, 25; and tit. Dower, c. 2, secs. 20-23.

The county court so held, and we affirm the decree.

LOUISVILLE AND NASHVILLE R. R. CO. v. STATE.

(3 HEAD, 522.)

THAT CORPORATION MAY BE INDICTED IS SETTLED LAW IN Tennessee.

RAILROAD COMPANIES ARE LIABLE TO INDICTMENT and fine for obstructing public highways contrary to the powers granted in their charter.

RAILWAY COMPANY CONSTRUCTING ITS ROAD OVER OR ACROSS PUBLIC HIGHWAY must, if possible, in so doing cause no inconvenience to the public; but where this cannot be done, the work must be performed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent an obstruction of the highway, the company must build it within a reasonable time, and cannot delay until its road is completed. And this is the rule whether the obstruction of the highway be expressly prohibited in the charter or not.

INDICTMENT for obstructing public highway. The opinion states the facts.

J. C. Thompson and N. S. Brown, for the appellant.

Head, attorney-general, for the state.

By Court, WRIGHT, J. That a corporation may be indicted has been repeatedly held in England and America, and is well settled in this state. It can no more omit its duty to individuals, or the public, than natural persons. Railway companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act. For instance, obstructing a carriage turnpike road by the piers of a railway bridge. So, also, for cutting off a public highway, and obstructing travel upon it, without and before constructing a substitute, in the manner required by their act. Undoubtedly, so long as the company keeps within its charter, it is not liable. As to the power which a railway company has to make a road over or across a public highway, the law is, that if possible the work must be constructed without any inconvenience to the public; but if it cannot be done without some inconvenience, it must be done with the least possible inconvenience. This is so whether the obstruction of the highway be expressly prohibited in the charter or not. If a bridge or a substituted road be necessary to prevent the obstruction, the railway company must build it immediately, or in a reasonable time, and cannot delay it till their road is completed. The company must so use their own rights as not to injure or take away the rights of others: *Redfield on Railways*, 515-518; *Commonwealth v. Eris and Northeast R. R. Co.*, 27 Pa. St. 339 [67 Am. Dec. 471].

These authorities and principles are decisive of this case. Here the obstruction of Spring street, a public highway in the town of Edgefield, had been, according to the finding of the jury, kept up by the defendant, the Louisville and Nashville Railroad Company, for more than three years, by the intersection of the highway with its road, and when a bridge would have removed the nuisance. This it was the duty of the company to have built, not only under the general principles of the common law, but by the terms of its charter, in which it was made its duty so to construct its road across a public road or highway as not to impede the passage of persons or property along the same; and in which it was expressly prohibited from obstructing any public road without constructing another as convenient as may be.

We do not deem it necessary in this case to discuss the manner in which a corporation, under our practice, may be coerced to appear to an indictment, because it may appear by attorney, and did so in this case, which removes all difficulty: Note 2 to Redfield on Railways, 515, 516.

The judgment of the criminal court will be affirmed.

CORPORATIONS, WHETHER INDICTABLE: See *State v. Great Works M. & M. Co.*, 37 Am. Dec. 38.

HIGHWAYS, REASONABLE USE OF AND WHAT OBSTRUCTIONS CONSTITUTE NUISANCE: See *Clark v. Fry*, 72 Am. Dec. 590, and cases cited in the note 599.

KNOTT v. CARPENTER.

[3 HEAD, 542.]

HUSBAND CANNOT CHARGE HIS WIFE'S REAL ESTATE FOR MONEY which he has expended in making improvements thereon; nor can a mechanic who expends money and labor on the wife's property at the sole instance of the husband so create a charge thereon; and a mechanic's lien for such expenditure is not enforceable.

BILL to enforce mechanic's lien. The facts are stated in the opinion.

E. and H. Cooper, for the complainants.

Whitesides, Davidson, and Reid, for the defendants.

By Court, McKINNEY, J. This was a bill to enforce a mechanic's lien. It seems that, by contract with the defendant William Carpenter, the complainants furnished materials and erected a dwelling-house for the former, on a lot in the town of

Shelbyville; for which, as they allege, there remains due to them about the sum of five hundred and twenty-five dollars, which they seek to enforce the payment of by a sale of the property.

The bill alleges that at the time of the contract with the complainants for the building of said house, the lot was claimed by said Carpenter and wife. The proof, however, establishes that some time before the contract, one William Brown, for a valuable consideration, made an absolute conveyance in fee of said lot to the defendant "Abigail Carpenter and the heirs of William Carpenter, her husband, and their heirs and assigns forever." This conveyance bears date the twentieth of September, 1856, and it appears to have been duly acknowledged and registered on the same day; and its validity is not questioned. It does not appear that Mrs. Carpenter had any participation whatever in the contract; nor is there any imputation of fraud or bad faith, so far as she is concerned.

The chancellor, upon the foregoing facts, decreed that the complainants had a lien on the house and lot, and directed a sale. This decree is clearly erroneous.

It is unimportant, as respects the determination of this case, whether the conveyance from Brown shall be held to vest the title in Mrs. Carpenter alone, or in her and the children of the marriage with William Carpenter jointly; and we intimate no opinion upon the question. In either view, no lien can exist in complainants' favor. The husband had no title; and of this fact there is ground to infer that the complainants had actual knowledge at the time of the contract. But whether so or not, they had constructive notice, from the registration of the conveyance from Brown, and that is sufficient, if the fact of notice were material.

If the complainants thought proper to trust alone to the lien given by statute for the security of their debt, it was incumbent on them, at their peril, to inquire into the title. The husband cannot himself charge the real estate of the wife for money expended by him in making improvements thereon: *Marable v. Jordan*, 5 Humph. 417 [42 Am. Dec. 441]; neither can a mechanic, who expends his money and labor on the wife's property, at the instance of the husband alone.

Nothing short of a conveyance by the wife jointly with her husband, in the mode prescribed by the statute, would divest the wife of her title to the lot in question. She has no power to charge it by the terms of the conveyance to her from Brown.

Since the act of 1849-50, c. 36, the husband's interest, by the common law, in the real estate of the wife cannot be subjected, in any mode whatever, during her life, by the creditors of the husband; nor can the husband, during the wife's life, make any disposition of it without her joining therein.

The decree will be reversed, and the bill dismissed.

MARRIED WOMAN'S ESTATE, WHEN CHARGEABLE WITH DEBTS AND CONTRACTS: See *Yale v. Dederer*, 72 Am. Dec. 503, and note citing many cases 513-515. As to whether the husband can charge the real estate of the wife for moneys expended by him in making improvements thereon, see *Marable v. Jordan*, 42 Id. 441, and note.

JOHNSON v. KIMBRO.

[3 HEAD, 557.]

COURTS CANNOT, BY JUDGMENT OR DECREE, PASS TITLE TO LAND situate in a foreign country; and therefore a court of another state has no jurisdiction to decree a partition of lands lying in the state of Tennessee.

COURT OF EQUITY MAY ENTERTAIN BILL FOR SPECIFIC PERFORMANCE of contract respecting land, situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court; and its decree will be enforceable against the person of the party to compel a performance of the agreement.

EJECTMENT. The facts are stated in the opinion.

Gault, for the plaintiff

D. Campbell, for the defendants.

By Court, McKINNEY, J. This was an action of ejectment brought by the plaintiff, Martha Johnson, to recover a tract of land of six hundred and forty acres, situate in Hickman county.

To establish her title, the plaintiff offered in evidence the transcript of a record of the superior court of law of Hillsborough district, North Carolina, purporting to be a proceeding for the partition of the real estate of Thomas Pearson, deceased, the uncle of the plaintiff.

It appears from the proof that said Thomas Pearson died intestate and without issue, in North Carolina, in the year 1800. He was the owner, at the time of his death, of a large real estate, situate partly in Tennessee, but chiefly in North Carolina. In 1802 his heirs at law, including the plaintiff and her husband, William Johnson, who was then living, filed their petition

in the court before mentioned, for the division amongst them of the lands lying in North Carolina; no mention being made in the petition of the lands in Tennessee. Commissioners were appointed according to the prayer of the petition, who proceeded to make partition, as well of the lands in Tennessee as of the lands in North Carolina; and to the plaintiff and her husband jointly was allotted, among other lands, the tract of six hundred and forty acres lying in Tennessee, in controversy in the present action.

The report of the division was returned by the commissioners, and the transcript of the record shows that at the April term, 1805, "on motion, it was ordered by the court that the said report be confirmed, and that the same be recorded." There is no decree vesting the title in the heirs in severalty to the lands allotted to them respectively.

It further appears that the coverture of the plaintiff continued till 1852, when William Johnson, her husband, died; and this action was commenced in less than three years from the time of his death.

His honor, the circuit judge, instructed the jury that the proceeding of the court of North Carolina partitioning the lands amongst the heirs of the intestate, was inoperative to vest the plaintiff with a title in severalty to the entire tract of land in Tennessee sued for in this action; but that she was entitled to recover her fractional share of said tract, as one of the heirs at law of the intestate, and the jury found accordingly.

This instruction was unquestionably correct. Passing by the want of authority, on the part of the commissioners, to make partition of the lands in Tennessee, which were not embraced in the petition, it is a well-established principle of international law "that a foreign court cannot, by its judgment or decree, pass the title to land situate in another country:" Story's Conf. L., sec. 548.

It is certainly true that a court of equity may entertain a bill for the specific performance of a contract respecting land situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court. In such case, although the court cannot bind the land itself by the decree, it can bind the conscience of the party in regard to the land, and enforce him, by process against his person, to perform his agreement. But the decree is merely *in personam*, and not *in rem*. Still the want of power to act upon the land, or to enforce the decree *in rem*, is no objection to the jurisdiction to act upon the

person, and in that mode compel an execution of the contract according to equity and good conscience: 2 Story's Eq. Jur., secs. 743, 744.

But this does not help the plaintiff's case. The proceeding of the court of North Carolina, if it be anything, is purely a proceeding *in rem*. What would have been the legal effect of a decree of the court, based upon the partition, divesting and vesting the title, in severalty, pursuant to the allotments made by the commissioners, we need not now stop to consider, as no such decree seems to have been made. There is no error in the record.

Judgment affirmed.

HOWARD v. HUFFMAN.

[8 HEAD, 562.]

EXECUTION AND DELIVERY OF DEED PASSES TITLE TO LAND, and the return of the deed to the vendor, whatever may be the intention of the parties, will not revest the title in him, but to effect this, a reconveyance is indispensable.

VOLUNTARY DESTRUCTION OR CANCELLATION OF DEED BY GRANTEE, with the intention of defeating his own title, will not of itself revest title in the grantor, but may have that effect upon the principle of estoppel, as a grantee so doing would be estopped from setting up such deed, or showing its contents by parol evidence.

EJECTMENT. The opinion states the facts.

Hickerson and Estell, for the plaintiff in error.

A. S. Colyar, for the defendant in error.

By Court, McKINNEY, J. This was an action of ejectment. Judgment for the plaintiff.

The court was requested by defendant's counsel to give the jury the following instruction, namely: "That if the deeds from Howard to Huffman were voluntary, and without consideration, and were, in point of fact, delivered to Huffman, and after such delivery they were redelivered by the latter to Howard, and such redelivery was intended by the parties to revest the title in him, the effect thereof would be to divest Huffman of title, and revest the same in Howard."

The court refused, and stated the contrary of this proposition to be the law. This was obviously correct.

By the execution and delivery of the deeds in question by Howard to Huffman, the former divested himself of the title,

and the latter became thereby vested with an inchoate legal estate before registration of the deeds.

By the mere act of returning the deeds to the vendor, whatever may have been the intention, no title could revest in him; to effect this, a reconveyance was indispensable.

It is well settled that even the destruction of a deed for land will not operate to revest the title in the grantor.

It is, perhaps, true that the intentional surrender or cancellation of the deed, made expressly with a view to revest the title in the grantor, might have the effect of a reconveyance; but this would be upon the principle of estoppel. The grantee, having voluntarily destroyed or surrendered the deed with the intention of defeating his own title, would be estopped from setting it up, or showing its contents by parol evidence: 4 Kent's Com. 196, note b.

This specific instruction, however, was not asked for; nor would it have been pertinent upon the proof in the record.

Judgment affirmed.

DESTRUCTION OR CANCELLATION OF DEED BY GRANTEE or its surrender to grantor, effect of: See *Tibbels v. Tibbels*, 59 Am. Dec. 329; *Thompson v. Thompson*, 68 Id. 639, and cases cited in the notes.

WASHBURN v. NASHVILLE & CHATTANOOGA R. R. Co.

[8 HEAD, 683.]

CORPORATIONS ACT THROUGH INSTRUMENTALITY OF OFFICERS AND AGENTS, to whom the authority of the corporation may be delegated so far as may be necessary to effect the purposes of its creation, if not prohibited by the charter.

SUPERINTENDENT OF RAILROAD COMPANY, CLOTHED WITH POWER AND AUTHORITY of board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate executive officer; and his negligent or improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the company's act in its corporate capacity.

RULE THAT MASTER IS NOT LIABLE FOR INJURY TO SERVANT, caused by negligence of a fellow-servant, is not applicable to a case where the servant injured was not at the time of the injury acting in the service of the master.

SERVANT OF RAILROAD COMPANY, IMPROPERLY ABSENT without leave, if received on one of the company's trains, other than that to which he belongs, without objection from the conductor, who is authorized and charged with the duty of excluding all persons not lawfully entitled to be on the train, may recover for an injury caused by a collision while on such train.

PERSON RIDING FREE AND IN BAGGAGE-CAR OF TRAIN, with knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger-car.

WHETHER RULE THAT MASTER IS NOT LIABLE FOR INJURIES TO SERVANT, caused by the negligence of a fellow-servant, is applicable to servants of railroad companies in different grades of employment, one being subordinate to the other, *quære*.

ACTION for damages for injury by a collision. The opinion states the facts:

Foster and McEwen, for the plaintiff.

Ewing and Reid, for the defendant.

By Court, McKINNEY, J. The plaintiff brought this action against the company to recover damages for an injury to his person, occasioned by a collision between two trains, on the defendant's road. Under the instructions of the court, the jury found against the plaintiff.

It appears that about the eighth of December, 1857, a bridge on the road, and perhaps a hundred yards of the track, were swept off by a flood, so that the trains were hindered from passing between Nashville and Chattanooga for some days otherwise than by keeping a train on each side of the breach in the road, and changing the passengers and baggage from one train to the other.

On the morning of the fourteenth of December, before the breach had been repaired, the superintendent of the road directed Chilcutt, an engineer in the employ of the company, to leave Nashville with his train at the hour of five o'clock A. M., the schedule time of departure being half-past two o'clock P. M. The superintendent informed the engineer that he would find a train in readiness on the other side of the breach in the road, and directed him to transfer his passengers and baggage to that train, and to go through to Chattanooga, stating that there would be no train from the latter place to Nashville that day. The agent of the company at Chattanooga, in ignorance of the order of the superintendent, started a train from the latter place on the same morning, and on a curve in the road the trains came in collision, whereby the plaintiff received a serious injury.

The telegraph wires were broken, so that no communication could be made in that way. The respective conductors of the trains being entirely ignorant of the orders given at the oppo-

site ends of the road, and neither having the least expectation of meeting a train, omitted the usual precautions to prevent a collision when running out of time. The proof shows that the train from Chattanooga was running on schedule time, but the other train was not.

It appears that the plaintiff was an engineer in the employ of the company. His train was lying idle at Chattanooga on account of the breach in the road; and on the day preceding the collision, he got upon another train to go to Nashville on a private errand of his own, without permission, as it would seem, from the proper agent of the company.

Chilcutt states that on his way to Chattanooga, on the day of the collision, the plaintiff got upon his train at Decherd's station, a point between Nashville and the break in the road, and took his seat in the baggage-car, the place where those who ride free should sit, and where he was sitting when the collision took place.

The proof shows that the superintendent had the entire management and control of the rolling stock of the road; that he always sent out and received the trains; and also had the control and management of the conductors, engineers, brakemen, and all other employees of the road, all of whom were bound to obey his orders, "according to the rules of the road."

The court instructed the jury, in substance, that the superintendent of the road and the plaintiff were both servants of the company; and that for an injury to the plaintiff by the negligence or misconduct of the superintendent, he could maintain no action against the company, if there were no fault or negligence on the part of the latter. That it made no difference that the one servant was higher in authority than the other, or that they belonged to different departments of the service. Nor did it make any difference that the plaintiff was not actually employed in the service of the company on the day the injury was received, unless he had abandoned the service of the company with the view of dissolving the relation of servant. The court further stated, in effect, that the board of directors of the company was to be regarded as the principal; and that an employee of the board, though styled president, or superintendent, could not be so considered.

These instructions in reference to the facts of the case are incorrect, we think, in several particulars.

The principle that the master is not liable for an injury re-

ceived by one servant from the negligence of another, while both are acting in the common business of the same master—as applied to railway companies—is comparatively a new one everywhere, but especially in our courts. It is a principle of great practical importance, and care must be taken that it be not applied to cases not clearly falling within it. In some of its incidents, it can scarcely be considered as yet fully settled. Whether the rule be applicable to servants in different grades, or where they are subordinate, the one to the other, or not, in the same employment, are questions upon which there is some conflict of opinion in the American cases. In most of the cases, however, it seems to be thought that such a distinction is not maintainable; and that it is sufficient that both servants were engaged in the same general business.

In the view we have taken of the present case, it is, perhaps, not necessary that we should very minutely consider to what extent the application of the rule may be varied or modified by the different circumstances of particular cases. We must be careful, however, that such a latitude be not given to the rule as would enable the corporation to evade liability in all cases, by intrenching itself behind its officers and agents.

In the view of the circuit judge, the superintendent of a railway company stands upon exactly the same footing, as respects the applicability of this rule, with any other employee, however subordinate his position; and so of the president; and that the board of directors only, in view of the rule, is to be regarded as the principal or master. Upon this question we have been referred to no authority exactly in point.

If this be correct, it will inevitably follow that the company cannot be held liable, in a case like the present, unless it can be shown that the injury resulted from the direct action of the company in its corporate capacity. This is absurd. The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation. It must act in this mode or not act at all.

The superintendent may be said to be, as respects this particular company, from the power shown to have been given him by the board, the immediate representative of the company—the corporate executive officer—intrusted for the time with the power and authority of the board of directors, so far as regards the control and management of the trains and all the arrangements connected therewith.

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In this view, the company must be held liable for an injury resulting from the negligence or improper order of the superintendent, just as much as if it had emanated directly from an act of the company in its corporate capacity.

The matter of fact, that it was culpable negligence in the superintendent to start a train from Nashville out of time, without any precaution whatever to avoid a collision with a train coming in the opposite direction, is not denied.

But the instructions are erroneous in another respect. The principle stated above does not apply "where the servant injured was not, at the time of the injury, acting in the service of the master. In such case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant:" *Hutchinson v. York, N. & B. Ry. Co.*, 6 Eng. R. & C. Cas. 580, cited in note to *Hayes v. Western R. R. Corp.*, 1 Am. Ry. Cas. 568.

The plaintiff in the present case may have been blamable for leaving his post of service without permission from the proper source; how that fact is, does not satisfactorily appear. But admitting he was improperly absent without leave, still he was received on another train of the company without objection by the conductor, who was intrusted with the duty of excluding all persons not lawfully entitled to be on the train. And whatever may have been the exact relation of the plaintiff to the company, under these circumstances, it certainly cannot be said, in the sense of the rule, or in any proper sense, that he was then acting in the service of the company. The fact that his absence from duty without permission may have made him liable to an action by the company, does not affect the question before us.

For the foregoing reasons, we think the rule is not applicable to this case.

The fact that the plaintiff was riding in the baggage-car does not affect the case; though, from the proof, that was the proper place for him to be under the circumstances.

It is laid down in *Redfield on Railways*, 331, 332, that "one being in the baggage-car, with the knowledge of the conductor, will not preclude him from a recovery for an injury caused by a collision, even though he might or would not have been injured if he had remained in the passenger-car:" *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468.

Nor does it affect the question that the plaintiff, at the time of the injury, was "riding free." The same author lays it

down that "the liabilities of the company attach, although the passenger were riding upon a free ticket." *Redfield on Railways*, 328, and note; see also *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468.

Upon the whole case, we think the judgment is erroneous, and it will be reversed.

LIABILITY OF MASTER FOR INJURY TO SERVANT BY NEGLIGENCE OF FELLOW-SERVANT; and who are fellow-servants: See *Fox v. Sanford*, 67 Am. Dec. 587, and the extensive note thereto, discussing this subject, 588-597. The principal case is cited in *Smith v. Oxford I. Co.*, 42 N. J. L. 471, to the point that was reserved in the opinion, as to whether the superintendent of a railroad company was a fellow-servant with an ordinary employee, and it is there held that they are not fellow-servants in a common employment.

LIABILITY OF CARRIER FOR INJURY TO PERSON RIDING ON BAGGAGE-CAR OF TRAIN: See note to *Ingalls v. Bills*, 43 Am. Dec. 366.

LIABILITY OF CARRIER FOR INJURY TO PERSON CARRIED GRATUITOUSLY: See *Nolton v. Western R. R. Corporation*, 69 Am. Dec. 623, and cases cited in the note 628. In *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 32, the principal case is cited to the point that a railroad company is liable to a person traveling on a free pass, for an injury caused by its negligence.

DAVIS v. PETWAY.

[3 HEAD, 667.]

AT PUBLIC AUCTION SALE OF LAND, VENDOR MAY, UNKNOWN TO BIDDERS, privately depute a third party to attend the sale, and bid progressively for the property on his account, as a defensive precaution to prevent it being sold at an under-value; but the employment of a number of persons as puffers to make fictitious biddings, with the view of taking advantage of the eagerness of buyers, to raise the price, and not as a defensive precaution, if the purchaser is actually misled, is fraudulent, and avoids the sale.

VENDOR PUBLICLY RESERVING RIGHT TO MAKE ONE BIDDING and no more through a person named, if he secretly employs others to make general and repeated biddings, is guilty of such fraudulent conduct as will entitle the purchaser to abandon the contract.

ADVERTISING THAT SALE IS TO BE WITHOUT RESERVE excludes all interference by the vendor or others for him, with the right of the public to have the property sold to the highest bidder, and any arrangement by him, with others, the result of which will be to prevent a sale under a fixed sum, will operate to avoid the sale.

BILL in equity. The facts are stated in the opinion.

Trimble and McEwen, for the complainants.

Reid, for the defendants.

By Court, McKINNEY, J. We perceive no error in the decree of the chancellor in this cause.

The complainant Davis seeks to avoid the purchase of four small lots of land made by him at public auction on the twenty-third of June, 1858, on the ground that by-bidders were employed, whereby he was induced to give a higher price for the same, and more than the lands were worth.

It appears that the lands had been divided into small lots, and were brought to sale by the executors of H. Petway, pursuant to the directions of the will of the testator.

The executors employed a person of experience to aid in the management of the general business of dividing, estimating the value, and selling the lands. A map was made, upon which the several lots were represented, and the minimum value of each marked thereon in figures. This was done by the executors, on consultation with the person employed by them to superintend the sale. The estimated value of the several lots seems, from the proof, not to have been unreasonable.

The proof clearly establishes that, prior to the opening of the sale, no arrangement was made, nor was anything said on the subject of procuring by-bidders at the sale. But it appears that during the progress of the sale, when the biddings for any particular lot were below the estimated value, the person employed to conduct the sale—of his own accord, and without any conference with the executors—would request some one of the by-standers to bid for the same to an amount in no instance exceeding the minimum value previously placed on the same; nor was more than one individual spoken to in any instance to bid for the same lot.

It appears that perhaps three different persons had been thus requested to bid during the progress of the sale, for different lots, by the agent conducting the sale, without the knowledge of the executors. But there was no such by-bidding as to any of the lots purchased by the complainant, except one; and the proof shows that in that instance the lot did not sell for more than its fair value, nor beyond the minimum price fixed upon it. It also appears that for some considerable time after his purchase the complainant seemed to be perfectly satisfied with his purchase.

Upon these facts, the chancellor dismissed the bill, and we think this was proper.

There is much discussion in the books upon the question whether a sale at auction may be avoided by the purchaser,

because by-bidders or puffers were employed by the owner or auctioneer. The proper way, it is said, is to give notice if such a thing be intended. But yet, the weight of authority, both in this country and in England, seems to be in favor of permitting the owner, without such notice, to employ a person to bid for him, if he does this in good faith, with no other purpose than to prevent a sacrifice of the property under a given price: 2 Parsons on Cont. 417; 2 Kent's Com., 5th ed., 538, 539; Addison on Cont. 134, 154. The latter author lays it down that the vendor may, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an under-value; but he cannot lawfully employ more than one person for such a purpose. If a number of persons are employed as puffers to make fictitious biddings, with the view of taking advantage of the eagerness of buyers to screw up the price, and not for a defensive precaution to prevent a sale at an under-value, this is an imposition and a fraud, and avoids the sale.

And if the vendor publicly reserves the right to make one bidding, and no more, through a person who is named, and then secretly employs another person to make general and repeated biddings, this is such a fraud as will entitle the purchaser to abandon the contract. And if by the advertisement the property is to be sold "without reserve," this excludes all interference by the vendor, or others for him, with the right of the public to have the property at the highest bidding. And in such case, any arrangement between the vendor and a third party, the result of which is to prevent the property from being sold under a fixed sum, will render the sale void.

It must often be very difficult, of course, to discriminate between an honest design to prevent a sacrifice of the property, and a fraudulent purpose to impose on bidders; but this does not affect the principle involved in the distinction.

It seems that in order to avoid the sale on this ground, it must be shown that under-bidders or puffers are employed to enhance the price and deceive other bidders, and that they are in fact misled thereby: 1 Story's Eq. Jur., sec. 293.

According to this doctrine, it is clear that in the present case there is no ground for avoiding the sale.

Nothing more was done by the agent of the defendants than was in good faith considered necessary to prevent a sale of the property at less than its fair value. This much it was law-

ful and proper to do. And there is no pretext for saying that the complainant was misled or imposed on thereby.

Decree affirmed.

EMPLOYMENT OF BY-AGENTS AND PUTTERS AT AUCTION SALES, and its effect on the validity of sales: See *Tunk v. Lomax*, 55 Am. Dec. 125; *Stokes v. Slave*, Id. 432, and cases cited in the notes. As to the effect of any arrangement tending to stifle fair competition at such sales, see *James v. Fulwood*, Id. 742, and cases cited in the note; *Pike v. Beck*, 61 Id. 263, and note.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

SOUTHERN STEAMSHIP COMPANY v. SPARKS.

[22 TEXAS, 607.]

WHARFINGER, LIKE COMMON CARRIER, MAY MAKE WHAT CONTRACT HE PLEASES AS TO HIS COMPENSATION.

WHERE WHARFINGER SPECIFIES HIS RATES OF CHARGES AND GIVES NOTICE TO CUSTOMER IN ADVANCE, and the latter afterwards makes use of the wharf, he thereby assents to the proposed charges, and cannot refuse to pay them on the ground that they are more than is reasonable or customary; and the same rule applies in the case of tavern-keepers and warehousemen.

ACTION upon account for wharfage dues. The plaintiff set out a copy of the published rates of charges on his wharf, of which he alleged the defendants had notice before contracting the account sued on, and he also averred that the charges in the account sued on corresponded with the published rates. The defendants pleaded a general denial. Upon the trial it was proved that the defendants had notice of the plaintiff's published rates of wharfage before they made use of the wharf. The defendants asked a witness whether the charges in the account were not more than a reasonable and remunerative compensation to the plaintiff for the use of the wharf; and whether there were any uniform customary charges; and whether the notice by the plaintiff was not the first establishment of such rates. The plaintiff's objection to these questions was sustained, and the defendants excepted. The court charged that if the defendants had full notice of the plaintiff's terms of wharfage, they would be bound by them. Verdict and judg-

ment were rendered for the plaintiff in the amount claimed. The defendants moved for a new trial on the ground that the court erred in excluding the testimony offered and in charging the jury. The motion was overruled, and the defendants appealed.

F. S. Stockdale, for the appellants.

Rector and Holt, for the appellee.

By Court, WHEELER, C. J. It cannot be doubted that a wharfinger, no less than a common carrier (1 Parsons on Cont. 649), may make what contract he pleases as to his compensation. If a tavern-keeper, warehouseman, or wharfinger specifies his rates of charges, and gives notice to a customer in advance, and the latter afterwards puts up at his tavern, or makes use of his warehouse or wharf, he thereby assents to the proposed charges, and cannot refuse to pay them, upon the ground that they are more than is reasonable or customary. By the use of the wharf, after notice of the plaintiff's rates of charges, the defendants impliedly contracted to pay them, and they cannot now disaffirm their contract. There is no error in the judgment, and it is affirmed.

Judgment affirmed.

SEAWELL v. GREENWAY.

[22 TEXAS, 681.]

ORDER OF COURT APPROVING ACCOUNT OF TRUSTEE, IN WHICH HE CLAIMS CERTAIN CREDIT, is not conclusive as to his right to such credit, but the court may, at a future time, investigate and restate the account.

ORDERS PASSING ACCOUNTS OF TRUSTEES MAY BE CONSIDERED AS ORDERS OR JUDGMENTS NISI, subject to be set aside upon future inquiry into the correctness of the accounts.

TRUSTEE CANNOT ESTABLISH FACT OF LOSS OF TRUST FUND by his own uncorroborated testimony.

TRUSTEE IS ALLOWED TO TESTIFY TO EXTENT OF LOSS BY THEFT OR ROBBERY; but a foundation for this testimony must be first laid by proving the theft or robbery *aliunde, scilicet*.

ASSIGNMENT by an insolvent to a trustee for the benefit of his creditors. The creditors applied to the court to enforce the assignment and obtain the payment of their claims. During the litigation the trustee died, and upon the application of the insolvent, with the concurrence of the creditors, the court appointed the plaintiff in error, Seawell, as trustee in the place of the deceased trustee. The opinion states the case.

Allen and Hale, for the plaintiff in error.

William S. Glass, for the defendants in error.

By Court, BELL, J. It appears from the record of this cause that the appellant Seawell was administering a trust estate for the benefit of creditors, under the control of the district court for Calhoun county.

It appears that the court, from time to time, appointed an auditor to examine the accounts of the trustee, and to report upon them. It appears that at the January term, 1857, of the court, the trustee filed an account, and the auditor appointed by the court also filed a report; but whether the report of the auditor was upon the account then filed by the trustee, or had relation to other accounts previously filed, does not very distinctly appear from the record, and is not, perhaps, very material.

In his account filed at the January term, 1857, the trustee, amongst other things, reported to the court that a sum of money, amounting to about one thousand three hundred and twenty dollars, belonging to the trust estate which he was administering, had been taken from his safe, between the fourth day of March, 1855, and the twenty-ninth day of September, of the same year, by some person to the trustee unknown. In other words, the trustee reported that the sum of one thousand three hundred and twenty dollars had been stolen from him. He asked that he might be allowed a credit for that amount, less his commissions on the same. It does not appear that the auditor objected, at that time, to the allowance by the court of the credit claimed by the trustee, on account of the money alleged to have been stolen.

The trustee made affidavit that the money had been stolen from him, but there was no other evidence of the theft, and no other evidence that the money was at any time deposited in the safe from which the trustee said it had been stolen. The court made an order, approving the account of the trustee. At the next term of the court, the auditor, in a report then made to the court, remarked upon the allowance to the trustee of a credit for the amount alleged to have been stolen, and questioned the right of the trustee to have the credit allowed him. At the same time, the defendants in error, as creditors interested in the trust estate which the plaintiff in error was administering, came into court, and denied the right of the trustee to have the credit allowed him. They also denied the

loss of the money, and prayed the court to compel the trustee to distribute the money amongst the creditors of the trust estate.

The court permitted an issue to be formed, and the trustee not being able to present to the court any evidence of the loss of the money, besides his own oath, the court decided that it was not competent for him to prove the loss of the money by his own oath, and made a decree charging the trustee with the amount alleged to have been stolen, and requiring him to pay out the same for the benefit of the creditors.

It is urged by the trustee, who is plaintiff in error, that the order of the court, at the January term, 1857, approving his account, was conclusive of his right to the credit which he claimed; and that it was error in the court to permit his account, at a future term, to be investigated, and to restate the same, thereby annulling the former order by which the account was approved. The trustee also insists that the court erred in its judgment, that he was not competent to prove the loss of the money by his own oath.

We are of opinion that the court did not err in permitting the claim of the trustee to be allowed a credit for the money alleged to have been stolen, to be contested by the creditors of the trust estate. The proceedings of the court, in the administration of the trust, were for the most part *ex parte*. The court was exercising the powers of a court of chancery, and it was very proper to consider all orders passing the accounts of the trustee as orders or judgments *nisi*, subject to be set aside upon future inquiry into the correctness of the accounts. It was competent for the court, in the administration of the trust, to proceed in such manner as best suited its own convenience, and the convenience of the agents who assisted the court in the administration of the trust, and above all, in such a manner as would best attain the object to be accomplished, which was the fair and just administration of the trust estate for the benefit of the creditors.

We are also of opinion that there was no error in the judgment of the court, that the trustee could not establish the fact of the loss of the money by his own testimony alone. There is a class of cases in which a party who sustains a loss by theft or robbery is permitted to testify to the extent of the loss. But in all these cases a foundation must be first laid for the oath of the interested party. And when the foundation has been laid, there is a limitation upon the party's right to prove the

extent of his loss by his own oath. An illustration of this class of cases is furnished by the case of *Herman v. Drinkwater*, 1 Greenl. 27. In that case, a shipmaster had received a trunk on board his vessel, to be carried to another port. On the way he rifled the trunk of its contents. The owner of the trunk, after proving the delivery of it to the shipmaster, and the fact that it had been rifled, was permitted to testify as to its contents. But even in such a case, the party interested can only recover damages for the value of such articles as are ordinarily necessary for the convenience and use of a traveler: See *Clark v. Spence*, 10 Watts, 335.

It is not very clearly settled whether, in any case, the party's own oath will be received as to the extent of his damages until the theft or robbery, as the case may be, has been proved *aliunde*. We have not been able to find a case where the party's own oath was received, unsupported by other evidence, to prove both a loss and the extent of it.

In the case of trustees, the law on this subject is more clearly settled than in the case of bailments. Mr. Hill, in his work on the law relating to trustees (marginal page 573), says: "Where, from necessity or convenience, a trustee is justified in keeping any part of the trust property in his possession, and without any negligence on his part it is lost by robbery, he will not be held responsible for the loss, but will be allowed the amount in passing his accounts, and this amount may be proved by the trustee's own affidavit, for it would frequently be difficult to obtain any other proof." The cases cited by the author in support of this proposition are *Morley v. Morley*, 2 Ch. Cas. 2; *Knight v. Earl of Plymouth*, 3 Atk. 480; and *Jones v. Lewis*, 2 Ves. sen. 240. It will be observed that the author does not say that the affidavit of the trustee will be received to prove the robbery, and the extent of the loss. And the cases cited only go to the extent of permitting the affidavit to be received in relation to the damages after the loss or robbery has been proved *aliunde*. The case of *Morley v. Morley*, *supra*, was decided in the year 1678, in the reign of Charles II. The defendant in that case was trustee for an infant, and received forty pounds in gold of the infant's money. The trustee was robbed by his servant of two hundred pounds of his own money, and the forty pounds belonging to the infant. The case shows that it was proved *aliunde* that the trustee was robbed of money. The loss of the forty pounds was proved by the trustee's oath alone. The trustee was held not chargeable with the forty pounds.

The case of *Knight v. Plymouth*, 3 Atk. 480, was not a case of robbery. In that case, Knight was the receiver of Lord Plymouth's estate. He had in his hands seven hundred pounds and upwards in rents. Not thinking it safe to remit the money to London, he paid it to a tradesman, who at the time was in good credit, and took bills on London for the amount. The tradesman unexpectedly became bankrupt, and the bills not being paid, the money was lost. The receiver was held not liable.

In the case of *Jones v. Lewis*, 2 Ves. sen. 240, the question of the admissibility of the party's own oath did not arise. In that case the lord chancellor said: "If a trustee is robbed, that robbery, properly proved, shall be a discharge, provided he has kept the goods as he would keep his own." We have noticed these cases thus, because the reports of them are not generally within the reach of the members of the profession in this state; and as they are quoted by a popular author in support of the general proposition that the trustee's affidavit will be received to prove the amount of a loss sustained by robbery, we have thought it proper to show that the cases do not lay down the doctrine that the robbery itself, as well as the amount lost, may be proved by the trustee's own oath.

In the case of *Clark v. Spence*, 10 Watts, 335, it was said that the party's own oath would not be received to prove the extent of a loss or the contents of a package, merely because no other evidence of the fact can be obtained. "For," said the court, "if a merchant, sending goods to his correspondent, chooses to pack them himself, his neglect to furnish himself with the ordinary proof is no reason for dispensing with the rule of evidence which requires disinterested testimony." So it may be said in this case that the trustee might have taken such precautions as would have enabled him to prove the robbery by other evidence than his own oath; and we do not think that the rule of evidence which requires disinterested testimony can be so much relaxed as to discharge the trustee from liability, under the circumstances of this case. Whatever relaxation of this rule has been recognized or permitted by the courts has been, where there is something peculiar and extraordinary in the circumstances of the case, as was said in the case above referred to, *Clark v. Spence*, *supra*.

That all the facts of this case may be understood, we think it proper to state that the trustee Seawell offered to prove by two witnesses that he had informed them of the loss of the

money about September, 1855, when he alleges that he first discovered the loss. The trustee also states in his affidavit, which accompanied his account rendered at the January term, 1857, and which he again offered in evidence on the final trial, that he did not open the safe in which the money was deposited from the fourth day of March until the twenty-ninth day of September.

The judgment of the court below is affirmed.

Judgment affirmed.

EXONERATION OF TRUSTEES BY THEFT, ROBBERY, CASUALTY, FAILURE OF BANKERS AND SOLICITORS, DEFAULTS OF AGENTS, ETC.—A trustee is bound to conduct the business of the trust in the same way in which an ordinarily prudent man of business conducts his own business. In the management and preservation of the funds from loss, he must use the same care that prudent men ordinarily use in their own business: *Note to Nyce's Estate*, 40 Am. Dec. 507; *Speight v. Gunt*, L. R. 22 Ch. D. 727; S. C., L. R. 9 App. Cas. 1; *Belchier v. Parsons*, Ambl. 219; *Massey v. Banner*, 1 Jac. & W. 241; *Litchfield v. White*, 7 N. Y. 438; *Mikell v. McKell*, 5 Rich. Eq. 220; *Carpenter v. Carpenter*, 12 R. I. 544; *Christy v. McBride*, 2 Ill. 75; *State v. Meagher*, 44 Mo. 356; *Fudge v. Durn*, 51 Id. 266. A trustee is not answerable for losses occurring without any fault or negligence on his part: *Knowlton v. Bradley*, 17 N. H. 458; S. C., 43 Am. Dec. 609. Investments which trustees may make: *Note to Nyce's Estate*, 40 Am. Dec. 506, 518.

THEFT, ROBBERY, AND BURGLARY, whereby the trust funds or property is lost without any negligence or default on the part of the trustee, exonerates him from liability for the amount so lost to the trust: *Morley v. Morley*, 2 Ch. Cas. 2; *Jones v. Lewis*, 2 Ves. sen. 240; *State v. Meagher*, 44 Mo. 356 (executor); *Foster v. Davis*, 46 Id. 268; *Fudge v. Durn*, 51 Id. 266; *Stevens v. Gage*, 55 N. H. 175 (administrator); *Furman v. Coe*, 1 Cal. Cas. 96; *Carpenter v. Carpenter*, 12 R. I. 544; 2 Story's Eq. Jur., sec. 1269.

Nature of Defense.—This defense is strictly an equitable defense, not a legal one. In *Cross v. Smith*, 7 East, 258, 259, it was attempted to establish for an executor in an action at law the liability of a gratuitous bailee, who, if robbed, is not responsible, unless he has been negligent: *Coggs v. Bernard*, 2 Ld. Raym. 918; but there being no precedent to this effect, Lord Ellenborough refused to establish one. Strictly speaking, therefore, the defense is an equitable one: *State v. Meagher*, 44 Mo. 360. And at law, loss by robbery furnishes no exoneration to an executor for money or assets of the estates actually received by him: Id.; *Cross v. Smith*, *supra*; see 3 Williams on Executors, 6th Am. ed., 1668, 1669. But at the present day, and under the modern practice, this will not often stand in its way as a defense in an action at law. Under the practice prevailing in the state of Missouri, it may be pleaded and proved in an action at law: *State v. Meagher*, 44 Mo. 356. In settling an administration account, a court of probate will act upon equitable principles, and the burglary of the trust funds will exonerate the administrator: *Stevens v. Gage*, 55 N. H. 175. The cases concerning public officers which hold that they are not exonerated by a robbery of funds in their hands do not apply to the cases of administrators and executors: *Fudge v. Durn*, 51 Mo. 266, 267.

Trustee must have Exhibited Due Care.—A robbery operates as a discharge of the trustee, provided he keeps the property as he would keep his own: *Jones*

v. Lewis, 2 Ves. sen. 240. In *Morley v. Morley*, 2 Ch. Cas. 2, which is the leading case upon the trustee's exoneration by robbery, the trustee was relieved from liability where the servant who lived in the house with him robbed him of the trust funds. In *Jones v. Lewis*, 2 Ves. sen. 240, the trustee was exonerated where the property was robbed from a solicitor into whose hands the trustee had delivered it, to be delivered over to the plaintiff. In *Stevens Gage*, 55 N. H. 175, the money was taken by burglars from an administrator's safe, and the administrator, not being guilty of any want of due care, was not liable. A testator directed his executors to invest five thousand dollars "in such stocks or other productive property as they may deem advisable, in their names as executors," for the benefit of his grandson. The executors invested five thousand dollars in three United States seven-thirty coupon-bonds, and two coupon-bonds of the state of Rhode Island. These bonds they put into an envelope, labeled "investment of five thousand dollars for" the grandson, with the date of the purchase, put this envelope into a tin box, and put the tin box into the vault of a bank in Providence. This it was held was a proper execution of the trust, and when the bank vault was broken into by burglars and the bonds taken, the trustees were not liable. This was a particularly unfortunate trust, for, after the loss of the bonds, the executors, by giving indemnity, obtained through an agent whom they had reason to believe honest, the issue of new United States bonds in place of those stolen, but the agent appropriated these bonds, and only a portion of their value could be recovered. For this second loss, it was held that the executors were not liable, since they had exercised the care of prudent men, and more could not be required of them: *Carpenter v. Carpenter*, 12 R. I. 544.

If the trustee has not been duly careful in keeping the property stolen, the stealing will furnish him no defense: See *Foster v. Davis*, 46 Mo. 268.

Evidence of Theft or Robbery.—The principal case clearly shows that the theft or robbery must be established by evidence *aliunde* before the trustee is permitted to testify to the extent of his loss; and that the trustee's uncorroborated testimony will not be received to prove the loss: See, however, *Fudge v. Durn*, 51 Mo. 266, where the robbery seems to have been proved by the trustee's own oath. Certainly the trustee may testify in his own behalf as to the theft or robbery of the trust funds: *State v. Meagher*, 44 Id. 356. The fact of the stealing of the trust funds should be made to appear as clearly as the case will admit, and the trustee's case being made out solely by his own testimony and that of members of his family, and the testimony being conflicting, and the circumstances of the case combining to oppose his defense, the trustee was not discharged: *Foster v. Davis*, 46 Id. 268. The amount lost by the robbery may be established by the trustee's own oath. In many cases, it is necessarily impossible to procure other evidence: The principal case; *Morley v. Morley*, 2 Ch. Cas. 2; 2 Story's Eq. Jur., sec. 1269. If the executor or trustee from whom the fund is stolen be dead, his personal representative may avail himself of the defense, though it wants the corroboration of the oath of the deceased trustee: *Furman v. Coe*, 1 Cal. Cas. 96.

LOSS BY CASUALTY AND OTHER CAUSES NOT DUE TO TRUSTEE'S DEFAULT.—
"There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands, unless they were taken by the queen's enemies. But it should seem, at least in a court of equity, that an executor or administrator stands in the condition of a gratuitous bailee, with respect to whom the law is that he is not to be charged without some default in him:" 3 Williams on Executors, 6th Am. ed., 1668. Trustees are not insurers against losses from casualties and misfortunes which ordinary sagacity

and diligence could not prevent: *Mikell v. Mikell*, 5 Rich. Eq. 220. Where the property of an estate has been taken by the public enemy, or has been lost through unavoidable accident, or, in case of animals, where they have perished from disease, if no negligence is imputable to the administrator or executor, he is not liable: *State v. Meagher*, 44 Mo. 359, per Currier, J. "If a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him. Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself. So if the testator's sheep, or other beast, die, or if his ships perish by tempest, the executor shall not be charged with them as assets:" 3 Williams on Executors, 6th Am. ed., 1669; *Jenkins v. Plombe*, 6 Mod. 181, 182; *Wightwick v. Lord*, 6 H. L. Cas. 234, 235. An administrator, who used proper precautions, and was guilty of no negligence, was held not liable for slaves belonging to the estate who ran away and were lost: *Mikell v. Mikell*, 5 Rich. Eq. 220; *Chaplin v. Givins*, Rice Eq. 132. Where an intestate left a bird, an ostrich, which subsequently died in the hands of the administrator, who suffered four months to elapse between the time of taking the inventory and the death of the bird, without exposing it to public sale, which four months, however, were the most inauspicious for its sale or exhibition, and it appeared that an immediate sale of it would have sacrificed the property, and the postponement was made apparently for the benefit of the estate, the court refused to charge the administrator with the appraised value of the bird: *Estate of Secondo Bosio*, 2 Ashm. 437. A loss by accidental fire will discharge an executor or administrator in equity: 3 Williams on Executors, 6th Am. ed., 1808; *Croft v. Lyndsey*, 2 Freem. Ch. 1. Executors and administrators are not bound to insure, nor to continue the insurance of their testator: *Croft v. Lyndsey*, *supra*; *Bailey v. Gould*, 4 You. & Coll. 221; *Rubottom v. Morrow*, 24 Ind. 202; *Dortch v. Dortch*, 71 N. C. 224. But see *Tuttle v. Robinson*, 33 N. H. 104.

FORGERY NO DEFENSE.—A trustee is bound to pay the fund to the right person, and is liable if he is deceived by a forgery: *Koves v. Hickson*, 30 Beav. 136.

LIABILITY IN CASE OF FAILURE OR DEFAULT OF AGENTS, SOLICITORS, ETC.—Where a trustee acts by other hands, either from necessity or conformably to common usage of mankind, he is not to be made answerable for losses: 2 Story's Eq. Jur., sec. 1269; *Belchier v. Parsons*, Ambl. 219; *Clough v. Bond*, 3 Myl. & C. 496; *Bacon v. Bacon*, 5 Ves. 334, 335; *Lewis v. Reed*, 11 Ind. 239. A trustee is bound to conduct the business of the trust in the same way in which an ordinarily prudent man of business conducts his own affairs. He may employ brokers and agents in cases in which they are employed in the ordinary course of business: *Speight v. Gaunt*, L. R. 22 Ch. Div. 727; S. C., L. R. 9 App. Cas. 1; *Carpenter v. Carpenter*, 12 R. I. 544; see *Stroud v. Guyer*, 6 Jur., N. S., 719. Thus, a trustee may employ a broker to effect investments of trust money, where that is the common course, and if he has been properly diligent, he will not be liable in case the broker embezzles the fund: *Speight v. Gaunt*, *supra*; see also *Carpenter v. Carpenter*, *supra*. Where the assignee of a bankrupt employs a broker to sell a quantity of tobacco, and the broker receives the money, and at the end of ten days fails before paying

it over, the assignee is not liable for the amount, since he acted with due care: *Belchier v. Parsons*, *supra*. Where an auctioneer is necessarily and properly employed by executors to make sales, and he fails, the executors are not liable for the loss of proceeds occasioned thereby, provided they have acted prudently and in good faith: *Edmonds v. Peake*, 7 Beav. 239. Where no negligence is attributable to executors, they do not become liable through the insolvency of an attorney whom they had every reason to trust, and in whom the testator had confidence: *Calhoun's Estate*, 6 Watts, 185. See also *Rayner v. Dearing*, 3 Johns. Ch. 578, where an administrator in Illinois employed an agent in Virginia to collect a demand due the estate from a resident of Virginia, and the agent collected the money and appropriated it to his own use, the administrator, having been guilty of no misconduct, and having acted in good faith, was not liable for the loss: *Christy v. McBride*, 2 Ill. 75; see also *Marshall v. Moore*, 2 T. B. Mon. 69.

On the other hand, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted, the trustee is liable, unless he can excuse himself on the ground of necessity, or that he has pursued the ordinary course of business: *Clough v. Bowd*, 3 Myl. & C. 496. A trustee who puts the fund out of his own control, so that other persons shall be able to deal with it, guarantees the solvency of those persons, and becomes answerable for any loss that may ensue: *Saboy v. Saboy*, 2 Russ. & M. 218. An executor or administrator who employs a person to collect debts or receive the moneys of the estate, is responsible for the money so received by the agent: *Pistor v. Dunbar*, 1 Anstr. 107; *Tebbs v. Carpenter*, 1 Madd. 290; *Kilber v. Sneyd*, 2 Moll. 186; *Green v. Hanbury*, 2 Brock. 403. That is, of course, if the agent has been unnecessarily employed or not in the usual course of business, or the executor has been negligent in looking after the affairs of the trust; otherwise the executor will not be liable: *Rayner v. Pearsall*, 3 Johns. Ch. 578, 584. Where a person employed by an assignee to receive the bankrupt's effects embezzled the funds, the assignee was compelled to make good the loss: *Re Earl of Litchfield*, 1 Atk. 87. An executor will be presumed to have received the money from his agent whom he employed to collect it, in the absence of countervailing proof: *Marshall v. Moore*, 2 T. B. Mon. 69. A trustee who unnecessarily leaves trust funds in the custody of a third person is liable if they are misapplied by the latter: *Matthews v. Brice*, 6 Beav. 239. Where trustees for sale sell the trust property and place the conveyance, executed by them and having their receipt indorsed, in the hands of a solicitor who receives and misapplies the purchase-money, they are liable for a breach of trust: *Ghost v. Waller*, 9 Id. 497. Where trustees authorized a firm of solicitors to draw the trust funds out of a bank, and one of the firm misapplies the funds, the trustees are liable: *Ingle v. Partridge*, 32 Id. 661. Trustees of stock, who sold it out and committed the proceeds to their solicitor for investment, by whom it was misapplied and lost, were liable for a breach of trust, and were suable either alone or jointly with the solicitor: *Rosland v. Witherden*, 3 Macn. & G. 568.

Where the trustee has been negligent in any way, he will be liable for his agent's default. Of two innocent persons, one of whom must suffer by the wrongful acts of a solicitor, the loss must fall on the trustee who employed him, and did not take all the precautions he might have taken against being deceived. And it is said that ordinary care and discretion in employing the solicitor will not relieve the trustee: *Bostock v. Floyer*, L. R. 1 Eq. 26, 28. If executors employ a person not authorized to practice law to foreclose a mortgage, and the mortgage is foreclosed irregularly and part of the debt lost

through the ignorance of the person employed, the executors are liable: *Watson v. Haileton*, 3 Barb. Ch. 148. Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practiced a fraud on the trustee, and that the security was insufficient. The trustee was held liable for the loss occasioned to the trust estate: *Sutton v. Wilders*, L. R. 12 Eq. Cas. 373. Upon the death of their testator the executors remitted to their solicitor eighty pounds to obtain probate, and twenty-five pounds to pay legacy duty. The solicitor became bankrupt, and the money was lost. The court allowed the eighty pounds to the executors, but not the twenty-five pounds, since the latter advance was premature, the legacy duty becoming payable only on payment of the legacies: *Castle v. Warland*, 32 Beav. 660. An administrator who retains the money of the estate for more than five years, and makes no effort during his whole administratorship to settle the estate, is not entitled to credit against the estate for the loss of the money through the insolvency of a broker with whom he deposited it for safe-keeping, although he was not otherwise negligent: *Wood v. Myrick*, 17 Minn. 408.

FAILURE OF BANKS.—The question frequently arises whether the trustee is exonerated when a bank fails in which the trust funds have been deposited. This is a case quite similar to that of the employment of agents, and the same rules apply. The trustee must be innocent of negligence, and must see that the bank is in good credit when he makes the deposit. Then if the deposit has been made from necessity or conformably to the common usage of mankind, the trustee will not be responsible for the loss upon the failure of the bank: 3 Williams on Executors, 6th Am. ed., 1818; *Churchill v. Holson*, 1 P. Wms. 243. Thus where trustees who have contracted to purchase land sell out stock, and deposit the proceeds at a banker's when the purchase seems to be near completion, they are not liable to make good the money if the banker fails: *France v. Woods*, 1 Taml. 172. A deposit in a bank pending an investment in mortgages or in public funds does not render the executors liable upon a failure of the bank two months after the deposit: *Fenwick v. Clarke*, 31 L. J. Ch. 728. A trustee is not chargeable with a loss by the failure of the banker in whose hands the money was deposited pending a transaction for the change of a trustee: *Adams v. Claxton*, 6 Ves. 226. Where a receiver paid the amounts of rents received by him to a tradesman in good credit, and took his bills for the sum in order to transmit the amount to London, and the tradesman failed, it was held that the receiver was not bound to make good the loss. "As the sum was large, it was a necessary precaution to remit it by bills rather than in specie:" *Knight v. Earl of Plymouth*, 3 Atk. 480. A trustee who deposited funds with a banker at Bristol, upon going to London to pass his accounts with the intention to draw upon the banker for it at London, was not liable upon the failure of the banker: *Roseth v. Howell*, 3 Ves. 564.

Executors are not bound to distribute the estate before the time required by law, and may keep the money in a bank until that time: *Johnston v. Newton*, 11 Hare, 169. Executors who have merely left moneys to the amount of two thousand pounds belonging to the estate in the hands of the bankers of the testator for a period of no more than nine months after his decease are not liable to make good the fund lost by the failure of the bankers: *Id.* If guilty of no negligence, default, or breach of trust, the trustee will not be liable in case of the failure of a bank. Executors who leave funds of the estate with the testator's banker are not liable in case of the failure of the

banker, where they are guilty of no negligence in taking steps to invest the funds as directed by the will: *Routh v. Howell*, 3 Ves. 564. When trustee or executor has money in his hands, and where he does not improperly omit to invest, and does not mix the money with other moneys, he is not liable for placing it for any reasonable time in the hands of a banker: *Wilks v. Groom*, 3 Drew. 584, 592. A trustee was held not liable for a loss occasioned by the failure of bankers of high standing, with whom he deposited the trust funds just before the war of the rebellion, and who failed soon after its close. The troublous times of the war were held to afford sufficient reason for his not investing the money in other ways: *Crane v. Moses*, 13 S. C. 561.

Trustee is Liable in Case of Improper or Unnecessary Deposit, or where He has been Negligent.—Trustees (executors) ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary: *Powell v. Evans*, 5 Ves. 839. And trustees taking upon themselves to lend the trust funds on private security must in all cases be responsible in case of the failure of the security: *Holmes v. Dring*, 2 Cox Ch. 1; *Walker v. Symonds*, 3 Swans. 63. A deposit in a bank is a loan upon personal security, and in case the bank fails the trustee will be liable, unless he can excuse himself by showing that the deposits were mere current collections of income, or that it was necessary to have a bank balance to fulfill the purposes of the trust: *Note to Nyce's Estate*, 40 Am. Dec. 515; or that he was guilty of no negligence, and acted, in depositing the funds, according to the ordinary course of business as a prudent man would act in managing his own affairs. Where no such necessity is shown for a deposit with bankers, their failure will not exonerate the trustees: *Darke v. Murtym*, 1 Beav. 525; *Macdonnell v. Harding*, 7 Sim. 178; *Lowry v. Fulton*, 9 Id. 115; *Moyle v. Moyle*, 2 Russ. & M. 710; *Clough v. Bond*, 3 Myl. & C. 490; *Barney v. Saunders*, 16 How. 535. Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker, who failed, were charged with the loss, they not having sufficiently shown that there was no laches on their part: *Moyle v. Moyle*, 2 Russ. & M. 710. A testator directed his executors and trustees to convert his property and invest it in prescribed securities. The trustees deposited the proceeds in a bank in their joint names. Some seven years after, one of the trustees died, and the other drew out the funds and applied them to his own use. As no sufficient reason was shown for retaining the money in the bank, it was held that the estate of the deceased trustee was liable to make good the loss: *Gibbins v. Taylor*, 22 Beav. 344. Where the will provided that the executors should invest the money in certain prescribed securities, and they drew the money out of one bank and deposited it in another, an investment not authorized by the will, and the latter bank failed, the executors were liable for the loss, notwithstanding a provision in the will that they should not be liable for losses by a banker of moneys deposited for safe custody: *Rehden v. Wesley*, 29 Id. 213. A sheriff who collects money, and of his own accord deposits it in a bank, that afterwards fails, is personally liable to the plaintiff in execution for the amount: *Phillips v. Lamar*, 73 Am. Dec. 731. In *Challen v. Shippam*, 4 Hare, 555, a trustee who deposited the fund with his bankers, accompanied by an order in writing to invest the money in consols, was held answerable for the omission of the bankers to make the investment, because he made no subsequent inquiry respecting the fund until about five months afterwards, when the bankers became bankrupt.

Trustee Who Deposits Trust Funds in his Own Name instead of to Separate Account for Trust is Liable upon Failure of Bank for the loss thereby

accruing to the trust estate: *Wren v. Kirton*, 11 Ves. 377 (receiver); *Fletcher v. Walker*, 3 Madd. 73 (executor); *Lunham v. Blundell*, 4 Jur., N. S., 3; *Wilkinson v. Bewick*, Id. 1010; *Masscy v. Banner*, 1 Jac. & W. 241; see remarks on this case in *Pennell v. Deffell*, 4 De G. M. & G. 386, 392; also *Speight v. Gausse*, L. R. 22 Ch. D. 727; S. C., L. R. 9 App. Cas. 1; *Commonwealth v. McAllister*, 28 Pa. St. 480; affirmed, S. C., 30 Id. 536; *Jenkins v. Walter*, 8 Gill & J. 218; *In re Stafford*, 11 Barb. 353; but see *Crane v. Moses*, 13 S. C. 561. Whenever a trustee opens a bank account for trust moneys, he should be very careful to designate the account as for the trust, and not deposit the funds in his own name. Trust funds should be "ear-marked." And mixing the trust funds with his own will of itself make the trustee liable in case of a loss. It is a well-settled principle of equity that trust funds are to be kept separate from the private funds of the trustee; and if mingled with his own, he may be charged with such funds, as being himself the borrower: *In Re Stafford*, 11 Barb. 353; see *Case v. Aberl*, 1 Paige, 393; *Kellett v. Rathbone*, 4 Id. 102; *Freeman v. Fairlie*, 3 Meriv. 29. By depositing the funds in his own name, he converts them to his own use, and thereby becomes a debtor of the estate and a creditor of the bank: *In re Stafford*, 11 Barb. 353. And if the trustee should fail before the bank, the sum would inure to the benefit of the trustee's creditors: *Jenkins v. Walter*, 8 Gill & J. 218. But see *Ex parte Cooke*, L. R. 4 Ch. D. 23. In a late case the effect of a deposit of the trust funds to the private account of the trustee is well illustrated: *School District v. First Nat. Bank*, 102 Mass. 174. It was there held that a trustee who deposits in a bank and causes to be credited to his private account money of the trust fund, without giving any notice that it is not his private property, or making any special agreement in regard to it, thereby converts it to his own use; and the bank may apply it upon a debt due by him to the bank. For these reasons, a trustee must not deposit the trust moneys in his own name. In *Lunham v. Blundell*, 4 Jur., N. S., 3, the trustee was held liable where he had deposited the trust funds in his own name although to a separate account.

Preparatory to the final winding up of a trust, the agent and solicitor of the trustee paid the trust money to his bankers to the credit of his general account with them, and informed the *cestui que trust* that the money was lying idle at his bankers. The *cestui que trust* took no notice of the information, and about a month afterwards the bankers failed. It was held that as the agent did not inform the *cestui que trust* that the money had been paid to the credit of his general account, and as the payment to the bankers was not necessary to the winding up of the trust, the agent and the trustee were jointly liable for the money: *Macdonnell v. Harding*, 7 Sim. 178. If an attorney pays into his bankers moneys of his clients, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss: *Robinson v. Ward, Ry. & Moo*. 274.

Trustee is Liable upon Failure of Bank, when He Deposits the Fund so as to Part with Absolute Control over It.—A receiver paid into a banking-house the sums he received, to the joint account of his sureties, under an arrangement with them that all drafts upon the sums so paid in should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held that the receiver was liable for the loss; for by thus parting with the absolute control over the fund, he renders himself less able to protect it in case of a prospective failure of the bank: *Sakoway v. Sakoway, alias White v. Bangh*, 2 Russ. & M. 215; 9 Bligh, 181; 3 Cl. & Fin. 44, overruling 8 C., 4 Russ. 60.

BALDWIN v. PEET.

[22 TEXAS, 708.]

GIVING TRUSTEE IN ASSIGNMENT FOR BENEFIT OF CREDITORS POWER TO SELL ON CREDIT, naming attorneys to be employed in executing the trust, and limiting the responsibility of the trustee, are badges of fraud rather than fraud *per se*; and from these facts, a court of equity, having the right to find the facts from the evidence, might well infer the additional fact of fraudulent intent.

POWER OF COURT OF EQUITY TO FIND MATERIAL FACT NOT ADMITTED, by inference and deduction from those that are admitted, does not pertain to the courts of Texas, in cases involving principles of equity, any more than in those involving questions of law.

STATUTE OF FRAUDS PRESENTS TWO DISTINCT MOTIVES WITH WHICH DEED MAY BE MADE, one vitiating and the other sustaining it. A failing debtor has not a right to maliciously, covinously, etc., execute a deed with intent to hinder, delay, or defraud his creditors; but he has a right, upon good consideration and *bona fide*, lawfully to convey his property in trust to pay his creditors, with or without preference.

WHEN DEBTOR MAKES DEED DISPOSING OF HIS PROPERTY UNDER INFLUENCE OF SPECIAL INTENTION to delay, hinder, or defraud creditors in the collection of their debts, the conveyance is fraudulent and void.

BARE INTENTION TO HINDER AND DELAY CREDITORS, PRESENT IN MIND OF DEBTOR at the execution of the deed, will not avoid it; for such is the usual and necessary effect of every general assignment for the benefit of creditors.

IF INTENTION TO HINDER AND DELAY CREDITORS BE NOT ONLY PRESENT IN MIND OF DEBTOR, but if also it be the object and constitute a part of the cause for the execution of the assignment for the benefit of creditors, the deed is void.

ASSIGNMENT FOR BENEFIT OF CREDITORS WILL BE VALID notwithstanding the debtor contemplated the hinderance and delay of creditors, if the purpose of the deed is to pay honest debts, either by general distribution or by exercising a preference among creditors.

COURTS OF EQUITY REGARD WITH FAVOR FAIR AND JUST MOTIVES OF FAILING DEBTOR in the equal distribution of his effects, by an assignment of all his property, even though its effects may necessarily be and must be foreseen to be to hinder and delay a vigilant or pressing creditor.

SPECIFIC MALICIOUS, COVINOUS, GUILTY INTENTION TO HINDER, DELAY, OR DEFRAUD CREDITORS is a question of fact to be ascertained upon evidence submitted to a jury.

RESERVATIONS TO DEBTOR RENDER VOID ASSIGNMENTS FOR BENEFIT OF CREDITORS, unless they are consistent with the objects of the deed.

ASSIGNMENTS FOR BENEFIT OF CREDITORS MAY BE VOID BY REASON OF INHERENT DEFECTS OF DEED as transfer of property; as where it vests no certain interest in any creditor, or where the property is not described so as to be identified.

IN TEXAS COURT MAY DECLARE VOID ASSIGNMENT FOR BENEFIT OF CREDITORS without the intervention of a jury, when the fraudulent intent is expressed or admitted; when it contains a reservation of an interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance; and when the deed is wanting in some of the qualities which, when wanting in any deed, render it invalid as a conveyance.

PROVISIONS IN ASSIGNMENTS FOR BENEFIT OF CREDITORS AUTHORIZING TRUSTEES TO SELL ON CREDIT, naming the attorneys to be employed in executing the trust and providing that the trustee shall not be answerable for the negligence or misdoings of other persons, might under some circumstances be proper, and are therefore subject to explanation by other facts. They are badges of fraud, not fraudulent *per se*; and though a court of equity might from such provisions deduce the ultimate fact of the fraudulency of the assignments, the Texas courts, as they do not possess this power, cannot declare such assignments void without the aid of a jury.

DELAY OF CREDITORS CONTEMPLATED MERELY AS INCIDENT DOES NOT AVOID ASSIGNMENT for benefit of creditors, and it is therefore erroneous to instruct jury that "if they believed from the evidence that the deed of assignment was made by Salles with an intention on his part to protect his goods from legal process on behalf of his creditors, or to delay the creditors in the collection of their debts, the deed would be void;" for the alternative should have been submitted to the jury whether the debtor contemplated the delay of creditors as the object and purpose of his assignment, or only as a necessary incident thereof.

ASSENT OF CREDITORS TO GENERAL ASSIGNMENT WILL BE PRESUMED so as to give it effect, though they may know nothing of it when it is made, though when made with a fraudulent intent, such assent will not be presumed, and the deed will be void though the fraudulent intent was unknown to the trustee.

RESERVATION OF PROPERTY NOT CONVEYED DOES NOT VITIATE ASSIGNMENT FOR BENEFIT OF CREDITORS, for the property, if not exempt from execution, is still liable to be taken by creditors, the same as if no assignment had been made. It is but a badge of fraud, subject to be explained or accounted for, and is important or unimportant evidence tending to establish fraud or not, according to the circumstances of the case.

CAUSE WILL BE REMANDED ON GROUND OF ERRONEOUS INSTRUCTION when it was given upon an isolated question about which there could be no doubt as to the facts, and it cannot be said with certainty that the jury, in rendering their verdict, considered only the main facts of the case.

PETITION for injunction. The opinion states the case.

Baldwin and Seawell, for the appellant.

F. S. Stockdale, for the appellees.

By Court, **ROBERTS, J.** This case involves the question of the validity of an assignment in trust for the benefit of creditors.

The petition of Baldwin, the trustee, represents that Peet, Sims, & Co., have recovered a judgment against Louis E. Salles, which they are endeavoring to satisfy by causing their execution to be levied, on the sixth day of May, 1854, upon certain property, being goods, wares, and merchandise, transferred to him by Salles, in trust for the benefit of creditors, in February, 1854; that Salles, from misfortune, not having sufficient means

to pay his debts, made this deed of assignment in trust to pay all his debts, equally and among the rest the one to Peet, Sims, & Co., upon which this judgment is rendered. The deed is made a part of the petition, and recites that Salles has not sufficient means, probably, to pay his debts, which also appeared in the estimate made in the schedule attached to the deed; also that he is desirous of making "such a disposition of his property as that sacrifices may be avoided, and that may produce the most that can be realized therefrom, to be promptly and justly distributed among his creditors."

It purports to be a general assignment of all his effects, to pay equally all his debts, with schedules of each annexed. It directs that the trustee "shall proceed in the manner that he shall deem best for the interest of all my [his] creditors, to sell and dispose of, etc., all the estates, stocks, goods, wares, merchandise, bills, bonds, notes of hand, accounts, and other things hereby conveyed, or intended to be conveyed, to such persons, for such prices, and upon such terms and conditions, for cash or customary credits, at private sale or public auction, as in his judgment may appear best, and most for the interest of all concerned; to collect the proceeds of such sales, and also to collect and realize, in money, the most that may be practicable, from the bills, bonds, notes of hand, accounts, claims, demands hereby conveyed," etc. Also, it directs that the trustee shall discharge all reasonable expenses, commissions, attorneys' fees of Simpson & Woodward, whom he is directed to employ, and divide the balance among the creditors *pro rata*, should there not be enough to pay them in full. It also contains a stipulation that Baldwin accepts the trust, and obligates himself to execute it "with diligence and fidelity," but that "he shall not be answerable for the negligence or misdoings of any other person." The deed was signed by Salles and Baldwin. The petition further alleges that the trustee, upon the execution of the deed, took possession of the property, and was proceeding to execute and perform his duties under the trust, when the execution was levied upon the goods, etc., in his possession; and prays an injunction to restrain the sale, and that he may be adjudged to be entitled to the possession of the goods, in order to carry out the trust reposed in him.

The defendants excepted to the petition generally and specially, that the deed was void upon its face for the reasons which will be noticed hereafter.

The exceptions being overruled, the defendants answered,

that the deed of assignment was fraudulent and void as to them, it having been made and contrived of malice, fraud, covin, collusion, and guile, with the intent and purpose to hinder, delay, and defraud these defendants, and other creditors of him, the said Louis E. Salles, etc.

On the trial before the jury, it was shown that Baldwin was in possession of the goods, disposing of them, etc., in pursuance to the trust, at the time of the levy; and the deed and record thereof was given in evidence. The defendants read in evidence a letter of Salles, written to a firm in New York, some time after he had made the assignment, disclosing the fact that he had reserved from the assignment funds, in money and notes, to the amount of one thousand one hundred and twenty-three dollars, which was retained, as he states, because he had used in his business nine hundred and eighty-two dollars of his wife's money.

The jury found a verdict in favor of the defendants, and a decree was rendered against the validity of the deed.

To sustain this decree, it is contended by the defendants that the court below should have sustained their special exceptions to the petition, instead of overruling them. If this be so, it will be unnecessary to consider the matters of law and fact arising upon the trial.

The exceptions were, that the deed was void and fraudulent upon its face, because: 1. It authorized the trustee to sell the effects on a credit if he wished; 2. It gave the trustee full discretion as to the mode of disposing of the property; 3. It named the attorneys to be employed in executing the trust; 4. It provided that the trustee should not be answerable for the negligence or misdoings of other persons.

If these be not sufficient to enable the court to pronounce the deed void on its face, as matter of law, then the plaintiffs below seek to reverse the decree rendered, because of errors alleged to have been committed in the charge of the court to the jury.

The court charged the jury that, "if they believed from the evidence that the deed of assignment was made by Salles, with an intention on his part to protect his goods from legal process on behalf of his creditors, or delay the creditors in the collection of their debts, the deed would be within the statute of frauds, and therefore void, and you should find for the defendants; and it would make no difference as to the validity of the deed whether Baldwin, the assignee, knew of the fraudulent

intention on the part of Salles, the assignor, or not; the deed would still be fraudulent and void. If you believe from the evidence that the assignor reserved, for his own use, a portion of the goods or their proceeds, and did not transfer the whole in good faith and honestly, the deed would be void, and you should find for the defendants."

This last charge was corrected by one asked by the defendants, so as to make it permissible to retain property exempt by law from forced sale.

These exceptions to the validity of the deed, for matters apparent on its face, and the correctness of these charges, constitute the questions in the case which alone it is necessary to consider, and are here presented together because they must all be determined by the view which may be taken of our statute of frauds.

In considering whether or not the court can determine the deed to be fraudulent and void, for matters on its face, it must be borne in mind that certain material facts are admitted by the pleadings, or appear on the face of the deed, to wit, that Salles was in failing circumstances; that he made professedly a general assignment in trust; that the execution was levied on the goods in a short time after the execution of the deed, before they were disposed of by the trustee; and that thereby it appears that the practical effect of the deed has been to hinder and delay a creditor in the ordinary and rightful pursuit of his remedy in collecting his debt. This effect was also evidently contemplated in making the deed, as evidenced by the expression of the assignor, that he "is desirous of making such a disposition of his property as that sacrifices may be avoided." Thus the court is put legitimately, as a starting-point, into the position to know the situation of the assignor, the character of the deed of assignment, and its necessary effect upon a creditor. The thing remaining to be ascertained is the intention with which the deed was made.

It is contended by the defendants that the court can determine that intention to have been fraudulent as to them, as matter of legal deduction, without the aid of a jury, by inspection of the terms of the deed, which is made part of the plaintiff's petition, to wit, in giving the trustee full discretion in the disposition of the property, and even to sell it on credit, if he should think it best, in naming attorneys to be employed in executing the trust; and in limiting the responsibility of the trustee. We think these are facts which may tend to estab-

lish the fraudulent intent. They are badges of fraud, rather than fraud *per se*. A court of equity, having a right to find the facts from the evidence, might well infer from these established and patent facts the additional and important fact of fraudulent intent; and having thus found it, declare the legal consequence by setting aside the deed as void; just the same as though the fraudulent intent was confessed in the petition. This power of a court of equity of finding one material fact, which is not admitted, by inference and deduction from those that are admitted, does not pertain to our courts in causes involving principles of equity any more than those involving questions of law, as contradistinguished from equity.

To ascertain the exact character of this intention, which renders a deed void, it is proper to refer to the language of the statute. It is, that every grant, etc., had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, etc., shall be taken to be utterly void as to such creditors. But this shall not extend to any estate or interest in lands, goods, etc., which shall be "upon good consideration, and *bona fide*, lawfully conveyed or assured to any person," etc. Here we are presented with two distinct motives or intentions with which a deed may be made; the one vitiating and the other sustaining it; and however difficult it may be to determine which one of the two was the cause of its execution practically, that must be the issue to determine its validity. A failing debtor has not a right to maliciously, covinously, etc., execute a deed with intent to hinder, delay, or defraud his creditors. A failing debtor has a right, upon good consideration and *bona fide*, lawfully to convey or assure by deed of assignment his goods, etc., in trust to pay his creditors, with or without preference: Burrill on Assignments, 98, 99.

Which of these propositions do the facts establish? is the practical question. It is important to consider the elements of these two propositions in connection. As to the first, it must be considered that the law favors the diligent, and recognizes the right of the creditor to demand and enforce the payment of his debt when it becomes due; and any disposition of the debtor's property by which this right of enforcement is hindered and delayed inflicts an injury upon the creditor. When the debtor makes a deed disposing of his property under the influence of this special intention, to inflict this injury upon

his creditor or creditors, then his act is said to be contrived in malice, covin, fraud, etc., which is designated in the statute as a guileful and covinous device and practice, which renders the conveyance void. The bare intention to hinder and delay creditors being present in the mind of the debtor, in making the deed, is not sufficient to avoid the deed. That is the usual and necessary effect of every general assignment for the benefit of creditors, and being so, it must be presumed to have been contemplated as a consequence of his act, however honest his intention may have been. If such intention, however, not only be present in the mind, but if it be the object and constitute a part of the cause for the execution of the deed, it will render it void: *Burrill on Assignments*, 375; *United States v. Bank of the United States*, 8 Rob. (La.) 402; *Farmers' Bank v. Douglass*, 11 Smed. & M. 469; *Ingraham v. Grigg*, 13 Id. 22.

On the other hand, if the purpose in executing a deed of assignment is to pay honest debts, either by general distribution or by exercising a preference among the creditors, it will be valid. In the language of a very great judge (Gaston, J.), "every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute of frauds. It is not embraced within its words, which apply only to such as are contrived of malice, fraud, collusion, or covin, to the end, purpose, and intent to delay, hinder, and defraud creditors:" *Hafner v. Irwin*, 1 Ired. L. 490 [34 Am. Dec. 390].

Courts of equity regard with favor the fair and just motives of a failing debtor, in the equal distribution of his effects, by an assignment of all his property, even though its effects may necessarily be, and must be foreseen to be, to hinder and delay a vigilant or pressing creditor; and it can readily be conceived that this just motive, as well as that of preferring some favorite creditors may, and often does, rise above any mere desire to thwart the urgent pursuit of any one or more creditors.

The character of this fraudulent intent may be further illustrated by the modes in which it is practiced.

1. When a deed is a mere pretense, collusively devised, is founded on a pretended consideration, and the parties do not intend the property to pass otherwise than ostensibly, there is

a trust that the grantee shall hold for the grantor's benefit. As to the creditors, the property was not passed, and the grantor's reservation shall inure to their benefit.

2. When there is a consideration, and it is the intention of the parties that the title to the property shall pass to the grantee irrevocably, but the influencing motive in making the transfer is the malicious intention to defeat entirely, or hinder and delay, the collection of honest debts.

The last proposition presents a transaction which is made void by the fraudulent intent. The first proposition presents one which is void, not only because of the specific fraudulent intent, but also because of the reservation of a benefit to the grantor, in the thing conveyed, inconsistent with the terms and ostensible object of the transfer, which is itself a fraud upon creditors, who are hindered and delayed by it: See *Twyne's Case*, 1 Smith's Lead. Cas. 33-35, and 48, with English and American notes of cases; *Wright v. Linn*, 16 Tex. 34; *Goodrich v. Downs*, 6 Hill, 438. The elements of these two propositions may be modified or blended, and thereby require the distinguishing features of each to be traced out and taken into consideration.

The specific, malicious, covinous, guileful intention to hinder, delay, or defraud creditors is a question of fact to be ascertained upon evidence as other facts are in our courts submitted to a jury: *Linn v. Wright*, 18 Tex. 317 [70 Am. Dec. 282]; *Seward v. Jackson*, 8 Cow. 406; *Goodrich v. Downs*, 6 Hill, 438.

The portions of this deed which, it is contended, render it void are evidence strongly tending to prove the specific intention, but they are only evidence of it; and if they invalidate it at all, it must be upon some other ground. The effect of a reservation of an interest in the thing conveyed depends upon the character of the conveyance. In a mortgage such reservation, whether expressed in the deed or not, is of itself harmless, because it is consistent with the object of the conveyance. This has been held, even where a failing debtor assigned a specific article of property to particular creditors, with a reservation to himself of any balance that may accrue. Although it was in the shape of a special assignment, it was held to be in effect a mortgage, and that the reserved balance, if any, did not vest, and was subject to be reached, according to its nature, either by execution or by bill in equity: *Leitch v. Hollister*, 4 N. Y. 211.

The same may be said, generally, of deeds of trust made in

good faith to secure and pay debts of particular creditors, which are in the nature of mortgages, with some of the qualities of an assignment superadded: Burrill on Assignments, 33; *Hafner v. Irwin*, 1 Ired. L. 490 [34 Am. Dec. 390]; *Elmes v. Sutherland*, 7 Ala. 262; *Farmers' Bank v. Douglass*, 11 Smed. & M. 469; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Burgin v. Burgin*, 1 Ired. L. 453.

These classes of cases are referred to merely to illustrate that reservations are sustained only when they are consistent with the objects of the deed.

In the case of a general assignment by a failing debtor, such as the one now under consideration, it has generally been held that a reservation of an interest in the thing conveyed will avoid the instrument: *Goodrich v. Downs*, 6 Hill, 438; Burrill on Assignments, 393. The rule is well stated by Justice Ormond in the case of *Gazzam v. Poyntz*, 4 Ala. 382 [37 Am. Dec. 745]: "An assignment by a debtor where the property conveyed by the deed is, by its terms, fairly and *bona fide* devoted to the payment of the creditors without stipulating any benefit to the debtor, and where the equitable interests of the creditors are fixed and determined by the assignment itself, is valid."

Mr. Burrill lays it down as a "settled general rule in American law, that a clause or provision in an assignment, by which any benefit or advantage is reserved to the debtor at the expense of the creditors, whether such benefit be temporary or permanent, whether it be in the shape of a gross or annual sum, employment at a compensation or otherwise, or whether reserved to the debtor himself, or for the support of his family, is a fraud in law, and vitiates and avoids the whole assignment." This is to be distinguished from a case where the reservation extends only to such property as may be exempt from forced sale: Burrill on Assignments, 235. And also from an assignment excepting from the operation of the conveyance itself, a certain portion of property for the use of the debtor, which of course, not being conveyed, is still subject to be seized by creditors, and which makes it really a partial assignment, though it may be in form general: Burrill on Assignments, 174, 175; *Id.* 97; *Ingraham v. Grigg*, 13 Smed. & M. 22. There is also a resulting trust in favor of the assignor, after payment of the debts, if any funds should be left, whether expressly reserved or not.

The principle of the rule in relation to a reservation of a

benefit may be traced, as it is believed, to the third section of our statute, Hart. Dig., art. 1453, which is in the nature of a proviso to the second, and provides that the latter "shall not extend to any estates, goods, etc., which shall be, upon good consideration and *bona fide*, lawfully conveyed or assured to any person," etc. A general assignment, whose object is to convey the effects of the debtor, and appropriate them to the payment of his debts, and which is sustained, as a lawful conveyance or assurance, notwithstanding its effect to hinder and delay creditors, because that is its object, can hardly be said to convey the property lawfully, and in good faith, when there is a reservation of an interest or benefit to the grantor in the property pretended to be thus appropriated. This is in unison with the principle developed in *Twyne's Case*, 1 Smith's Lead. Cas. 34, 48, in which it is said "continuance of the possession in the donor is the sign of trust"—that is, of a mere reservation of use, interest, or benefit—inconsistent with the terms of the deed. This reservation of an interest or advantage is sometimes exhibited in retaining control of the appropriation of the effects, directly or indirectly: *Burrill on Assignments*, 398; *Sheldon v. Dodge*, 4 Denio, 217; *Cannon v. Peebles*, 4 Ired. L. 204; *Hart v. Crane*, 7 Paige Ch. 37.

Such assignment may also be held invalid by the court under this third section by reason of the inherent defects of the deed, as a transfer of property. For instance, where it does not vest in any creditor certain, direct, or absolute interests in the property: *Gazzam v. Poyntz*, 4 Ala. 374 [37 Am. Dec. 745]; or where there is no such description of the property, by schedules or otherwise, as that it can be identified or ascertained: *Linn v. Wright*, 18 Tex. 317 [70 Am. Dec. 282].

Then, as to such a general assignment, it may be safely assumed, as it is believed, that the court may pass upon its validity, and declare it void or inoperative as to creditors, when the fraudulent intent is expressed or admitted; when it contains a reservation of an interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance; and when the deed is wanting in some of the qualities, which, when wanting in any deed, render it inoperative and invalid, as a legal conveyance of property.

The portions of the deed which it is contended avoid it will not fall under either of these grounds of judicial cognizance. To advance further brings us into a broad field of uncertainty, amidst a maze of conflicting authority. The light of authority

is weakened, also, by the various different statutes, in England and the states of this Union, which have influenced the decisions of the courts upon the subject.

Giving the trustee a discretion to sell the goods on a credit has sometimes been held to be a fraud in law upon creditors: *Barney v. Griffin*, 2 N. Y. 365. Other cases establish the contrary doctrine: *Ashurst v. Martin*, 9 Port. 566. If the debts were not due for some time, it might be a very proper provision to sell on a credit.

Also a discretion to the trustee as to the manner of sale, whether private or public, etc., has been sustained as proper: *Abercrombie v. Bradford*, 16 Ala. 560; *Neally v. Ambrose*, 21 Pick. 185.

In the case of *Ashurst v. Martin*, *supra*, a limitation of the responsibility of the trustee, very similar to the one expressed in this deed, was held not to vitiate the assignment: *Burrill on Assignments*, 208.

The naming of attorneys to be employed in the execution of the trust, it is believed, stands on the same footing as the appointment of a trustee. The attorney, when engaged in the business, as well as the trustee, must act on his own responsibility, and if the appointment should be injudicious, it will be a badge of fraud: *Burrill on Assignments*, 399.

In none of these provisions is there anything to be found which might not be proper under some circumstances, and therefore they are subject to explanation by other facts: *Cunningham v. Freeborn*, 11 Wend. 241.

The charges of the court were erroneous. It has been seen that the fraudulent intent by which a deed is rendered void is not necessarily involved in the mere intention, on the part of the assignor, "to protect his goods from legal process," where the intention to hinder and delay is an incident contemplated as a consequence of his act, but not designed in whole or in part as the object of it. If the intention to hinder and delay creditors influenced, in whole or in part, the assignor as an object in making the deed, it would be void. If, on the other hand, to hinder and delay creditors was only contemplated as an incident, and his real purpose and object in making the deed was to pay his debts by assignment of his effects, it would be valid. Whether the assignor was actuated by the one or the other of these different purposes in making the deed was the true issue in the case, upon the question of intention. The alternative of determining the one or the

other, according to the evidence, should have been submitted to the jury. This was not done in any part of the charge, either directly or inferentially.

That part of the charge which made it immaterial whether the trustee knew the fraudulent intent of the assignor or not does not appear to be objectionable in this case. The American decisions hold that the assent of creditors to a general assignment will be presumed so as to give it effect, although they may know nothing of it when it is made: *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Cunningham v. Freeborn*, 11 Wend. 241; *United States v. Bank of United States*, 8 Rob. (La.) 262; *Abercrombie v. Bradford*, 16 Ala. 560.

While its validity rests upon a presumed fact, it is but fair that the presumption of assent should extend to the whole transaction; otherwise, by the legal presumption, a fraud might be aided by its perpetration. Hence it has been held that where an assignment in trust was made with a fraudulent intent unknown to the trustee, the assent of the creditors would not be presumed: *Townsend v. Harwell*, 18 Ala. 301; *Burrill on Assignments*, 311.

The second charge cannot be sustained, as it is believed. A reservation of property not conveyed does not necessarily vitiate the assignment. The property, if not exempt from forced sale, is still liable to be taken by creditors, the same as if no assignment had been made: *Burrill on Assignments*, 174, 197, 225; *Ingraham v. Grigg*, 13 Smed. & M. 22.

Under such a rule, the reservation of a small amount, either openly or privately, on purpose or by accident, would inevitably defeat a general assignment of a large estate appropriated to creditors upon the fairest terms; and however it may have happened, it would be beyond the reach of any explanation consistent with fair dealing. It is, indeed, but a badge of fraud, subject to be explained or accounted for, and is important or unimportant evidence, tending to establish fraud or not, according to the circumstances of the case.

We are of opinion, then, that the court below did not err in refusing to adjudge the deed to be fraudulent upon its face, for the causes set out in the exceptions of the defendants. But there being error in the charges of the court, which may have been material in finding the verdict by the jury, the judgment is reversed, and the cause will be remanded.

The first charge above referred to, though erroneous, was not greatly calculated to mislead the mind of the jury; and upon

that alone, under the facts of the case, the verdict and judgment would not be set aside. The second charge referred to, as to the reservation, was upon an isolated question, about which there could possibly be no doubt upon the facts; and that charge being erroneous, there is not any certainty that the minds of the jury passed upon the main facts of the case, upon which we would sustain the verdict, if we were to sustain it at all. As we cannot say with certainty that this error may not have influenced the finding, the cause will be remanded.

Reversed and remanded.

WHEELER, C. J., delivered a dissenting opinion.

ASSIGNMENT MADE TO DELAY CREDITORS IS VOID: *Knight v. Packer*, 73 Am. Dec. 388, note 392; but mere incidental delay will not avoid the assignment: *Nicholson v. Leavitt*, 57 Id. 499, note 505; *Hempstead v. Johnston*, 65 Id. 458. Mere intent to hinder or delay creditors will not avoid an assignment: *Houston etc. R. R. Co. v. Winter*, 44 Tex. 609, citing the principal case; *Hoffman v. Mackall*, 64 Am. Dec. 637. It is not "a sound objection to an assignment that it operates to hinder and delay creditors, for this is the usual and almost invariable consequence of an assignment. There must be a fraudulent intent, that is, an intent which the law will not permit to be carried into effect—an intent to secure some benefit to himself, or to withhold some right from his creditors beyond what the law permits, in order to invalidate the assignment. If this intent be expressed in the deed, the court may declare it to be void; but if the fraudulent intent be not expressed in the deed itself, then it can only be invalidated by proof, to the satisfaction of a jury, that the fraudulent intent existed at the time of the execution of the deed." *Bailey v. Mills*, 27 Tex. 437, citing the principal case. When the deed is a mere pretense, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with intent to defraud creditors, the conveyance is void: *Chandler v. Von Roeder*, 24 How. 227.

PREFERRING CREDITORS OR SET OF CREDITORS IN ASSIGNMENT: See *Born v. Shaw*, 72 Am. Dec. 633, and note citing prior cases 635; *Bryan v. Bristin*, Id. 219; *Linn v. Wright*, 70 Id. 282. A debtor may prefer creditors: *Bailey v. Mills*, 27 Tex. 437; *Irion v. Mills*, 41 Id. 318, citing the principal case.

RESERVATION IN ASSIGNMENT OF BENEFIT TO DEBTOR: See *Linn v. Wright*, 70 Am. Dec. 282, and cases cited in the note 291; *Grimsley v. Hooker*, 67 Id. 227; *Hoffman v. Mackall*, 64 Id. 637. The principal case is cited as drawing the distinction between assignments and mortgages: *Dwight v. Overton*, 25 Tex. 412.

FRAUDULENT INTENT IS QUESTION FOR JURY: *Linn v. Wright*, 70 Am. Dec. 282, note citing prior cases 291. The principal case is cited to the point that the Texas courts do not possess the power of courts of equity of finding one material fact that is not admitted from those that are admitted, and hence the court may not infer the fraudulent intent from certain badges of fraud: *Van Hook v. Walton*, 28 Tex. 71; *King v. Russell*, 40 Id. 132; *Kerr v. Hutchins*, 46 Id. 390; *Scott v. Alford*, 53 Id. 92. If there is apparent, upon the face of

the instrument by its express terms, or as the indisputable legal presumption therefrom, either such actual fraud in fact or such constructive fraud in law as should avoid it, then it is the duty of the court to so construe the instrument and declare its legal effect; otherwise, it is a question of intention to be decided by the jury: *Eicks v. Copeland*, Id. 589. The courts of Texas may pass upon the validity of a general assignment, and declare it void or inoperative as to creditors: 1. When the fraudulent intent is expressed or admitted; 2. When it contains a reservation of an interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance; 3. When the deed is wanting in some qualities which, when wanting in any deed, render it inoperative: *Van Hook v. Walton*, 28 Id. 71, 72. When a well-defined legal fraud is shown upon the face of the instrument itself without a resort to extrinsic testimony, then, as in any other contract which is expressly illegal, or contrary to public policy, it is the duty of the court to construe and declare its legal effect: *Peiser v. Petzelas*, 50 Id. 647; *Scott v. Alford*, 53 Id. 93.

ASSIGNMENT MAY BE VOID WHERE THERE IS NO DESCRIPTION OR SCHEDULE in the deed whereby the property can be identified: *Linn v. Wright*, 70 Am. Dec. 282, note 291.

ASSIGNMENT GIVING TRUSTEE POWER TO SELL ON CREDIT: *Inless v. American Exchange Bank*, 69 Am. Dec. 190, and cases cited in the note 195; *Hoffman v. Mackall*, 64 Id. 637. That the assignee has a right to sell on credit is but a badge of fraud: *Eicks v. Copeland*, 53 Tex. 590, citing the principal case.

ASSIGNMENTS FOR BENEFIT OF CREDITORS ARE REGARDED WITH FAVOR: *Hoffman v. Mackall*, 64 Am. Dec. 637.

ASSENT OF CREDITORS TO TRUST DEED FOR THEIR BENEFIT IS PRESUMED: *Ingram v. Kirkpatrick*, 51 Am. Dec. 428; see note to *Hempstead v. Johnston*, 65 Id. 474.

ERRONEOUS INSTRUCTIONS NOT PREJUDICIAL ARE NOT GROUND FOR REVERSAL: *Saltstall v. Riley*, 65 Am. Dec. 334. If there is doubt, however, the court will incline to give the appellant the benefit of it: *Western Stage Co. v. Walker*, Id. 789.

THE PRINCIPAL CASE IS CITED TO THE POINT THAT TO SUPPORT A SALE OF personal property where there is no change of possession as against a creditor or subsequent purchaser, proof of good faith is as essential as proof of a sufficient consideration: *Phillips v. Reits*, 16 Kan. 399.

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2. **DOCTRINE OF CONFUSION OF GOODS IS:** If the goods can be distinguished and separated, each may claim his own; if the goods are of the same nature and value, as corn, tea, etc., then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions, or through whose neglect or fault occurs, the wrongful mixture must bear the whole loss. *Id.*

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ADVERSE POSSESSION.

1. **MERE INTENT TO HOLD ADVERSELY WILL NOT MAKE POSSESSION ADVERSE** that was commenced in subservience to the owner's title. *Benson v. Brandon*, 655.
2. **ATTEMPT TO BETTER TITLE BY PROCURING TAX TITLE TO LAND** cannot injure an inchoate right that one may have previously acquired under the statute of limitation. It does not render his possession less hostile. *Id.*
3. **WIDOW OF TENANT FOR LIFE, WHO CONTINUES IN POSSESSION** without any contract between herself and the owner, holds in subordination to the owner's title, and not adversely. She is at least a tenant by sufferance. *Id.*
4. **ONE WHO MARRIES WIDOW OF TENANT FOR LIFE, WHO IS HOLDING OVER** after the death of her husband, enters by virtue of her tenancy by sufferance, and not adversely; and his possession, not having commenced adversely, is presumed to have continued as it commenced, in privity with the owner. His possession is not made adverse by any mere intent he may have had. *Id.*
5. **ONE ENTERING, NOT ADVERSELY, BUT EXPRESSLY OR LEGALLY IN SUBSERVIENCE TO OWNER'S TITLE**, cannot be permitted to treat his subsequent continued possession as adverse; but before the statute commences to run in his favor, the privity between him and the owner must have been disowned and severed by some unequivocal act. *Id.*

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AGENCY.

1. **RAILROAD COMPANY HOLDS OUT ITS AGENT** as competent and fit to be trusted, and thereby, in effect, warrants his fidelity and good conduct in all matters within the scope of the agency. Hence if such agent is guilty of misconduct, rashness, or negligence, the company will be responsible for any injury resulting therefrom. *New Orleans etc. R. R. Co. v. Allbritton*, 98.
2. **PRINCIPAL MUST BE HELD RESPONSIBLE** where his employment afforded the agent the means or opportunity which he used while so employed in committing an injury on a third person, and the willful trespass or injury of the agent derived from the authority confided to him by the principal, as a source of power in the exercise of his master's employment, makes the principal responsible. *Id.*
3. **AUTHORITY OF AGENT TO EXECUTE DEED FOR HIS PRINCIPAL MAY BE PRESUMED** from proof that the principal received the purchase-money, and that the vendee went into possession under the deed, which, on its face, purports to have been executed by such agent, and has held such possession for twenty years. *Bias v. Cockrum*, 76.
4. **PERSONS WHO ARE NOT PRIVIES CANNOT DISPUTE** the authority of persons performing an act as agent of another. *St. Louis Public Schools v. Risley*, 131.

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ARBITRATION AND AWARD.

1. **PARTY LITIGANT MAY, IF HE WILL, REFER TO HIS ADVERSARY, or to any one interested adversely to himself, and such submission will be enforced.** *North L. R. Co. v. McGraw*, 624.
2. **WHERE CONTRACT FOR CONSTRUCTION OF RAILROAD PROVIDES THAT DECISION OF CHIEF ENGINEER OF COMPANY SHALL BE FINAL and conclusive in any dispute that may arise between the parties thereto touching the same, the person who fills the office of chief engineer when the adjudication is called for is the proper person to decide, and not the person who filled the office at the time the contract was made, but who had resigned before the necessity for adjudication arose. And if the company fail to appoint a chief engineer, the contractor may resort to the courts of law.** *Id.*

ASSAULT AND BATTERY.

1. THAT PLAINTIFF IS TURBULENT, OR DEFENDANT QUIET IN DISPOSITION, is not competent evidence in an action for damages for an assault and battery. *Smithwick v. Ward*, 453.
2. JOINT VERDICT AGAINST ALL is proper, in an action for damages for an assault and battery, when it appears that it was a joint act of all, either by counseling it before its commission, or by being present when the trespass was committed, and aiding, abetting, and encouraging, or by committing the trespass itself. *Id.*

See RELEASE; SCHOOLS, 2.

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See ASSIGNMENT FOR BENEFIT OF CREDITORS, 16.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. RECONVEYANCE TO GRANTOR OF ESTATE WHICH HAD BEEN CONVEYED IN TRUST for the benefit of creditors, by instrument reciting the complete execution of the trust, when, in fact, the objects of the trust have not been completed, some of the creditors being still unpaid, is, under the New York statute, void and in contravention of the trust; and a mortgagee in good faith, after such reconveyance, having only constructive and not actual notice of such trust, will take subject to the execution of the trust, and is entitled to redeem the land by satisfying the claims of the *cestui que trust*. *Briggs v. Davis*, 363.
2. MORTGAGEE OF LAND, AFTER CONVEYANCE THEREOF IN TRUST for the benefit of creditors, though a proper, is not a necessary, party to an action by the beneficiaries of the trust to enforce its execution. *Id.*
3. GIVING TRUSTEE IN ASSIGNMENT FOR BENEFIT OF CREDITORS POWER to SELL ON CREDIT, naming attorneys to be employed in executing the trust, and limiting the responsibility of the trustee, are badges of fraud rather than fraud *per se*; and from these facts, a court of equity having the right to find the facts from the evidence might well infer the additional fact of fraudulent intent. *Baldwin v. Peck*, 806.
4. STATUTE OF FRAUDS PRESENTS TWO DISTINCT MOTIVES WITH WHICH DEED MAY BE MADE, one vitiating and the other sustaining it. A failing debtor has not a right to maliciously, covinously, etc., execute a deed with intent to hinder, delay, or defraud his creditors; but he has a right, upon good consideration and *bona fide*, lawfully to convey his property in trust to pay his creditors, with or without preference. *Id.*
5. WHEN DEBTOR MAKES DEED DISPOSING OF HIS PROPERTY UNDER INFLUENCE OF SPECIAL INTENTION to delay, hinder, or defraud creditors in the collection of their debts, the conveyance is fraudulent and void. *Id.*
6. BARE INTENTION TO HINDER AND DELAY CREDITORS, PRESENT IN MIND OF DEBTOR at the execution of the deed, will not avoid it; for such is the usual and necessary effect of every general assignment for the benefit of creditors. *Id.*
7. IF INTENTION TO HINDER AND DELAY CREDITORS BE NOT ONLY PRESENT IN MIND OF DEBTOR, but if also it be the object and constitute a part of the cause for the execution of the assignment for the benefit of creditors, the deed is void. *Id.*

8. **ASSIGNMENT FOR BENEFIT OF CREDITORS WILL BE VALID** notwithstanding the hindrance and delay of creditors, if the purpose of the deed is to pay honest debts, either by general distribution or by exercising a preference among creditors. *Id.*
9. **COURTS OF EQUITY REGARD WITH FAVOR FAIR AND JUST MOTIVES OF FAILING DEBTOR** in the equal distribution of his effects, by an assignment of all his property, even though its effects may necessarily be and must be foreseen to be to hinder and delay a vigilant or pressing creditor. *Id.*
10. **SPECIFIC MALICIOUS, COVINOUS, GUILEFUL INTENTION TO HINDER, DELAY, OR DEFRAUD CREDITORS** is a question of fact to be ascertained upon evidence submitted to a jury. *Id.*
11. **RESERVATIONS TO DEBTOR RENDER VOID ASSIGNMENTS FOR BENEFIT OF CREDITORS**, unless they are consistent with the objects of the deed. *Id.*
12. **ASSIGNMENTS FOR BENEFIT OF CREDITORS MAY BE VOID BY REASON OF INHERENT DEFECTS OF DEED** as transfer of property; as where it vests no certain interest in any creditor, or where the property is not described so as to be identified. *Id.*
13. **IN TEXAS COURT MAY DECLARE VOID ASSIGNMENT FOR BENEFIT OF CREDITORS** without the intervention of a jury, when the fraudulent intent is expressed or admitted, when it contains a reservation of an interest, advantage, or benefit to the assignor inconsistent with the object of the conveyance; and when the deed is wanting in some of the qualities which, when wanting in any deed, render it invalid as a conveyance. *Id.*
14. **PROVISIONS IN ASSIGNMENTS FOR BENEFIT OF CREDITORS AUTHORIZING TRUSTEES TO SELL ON CREDIT**, naming the attorneys to be employed in executing the trust, and providing that the trustee shall not be answerable for the negligence or misdoings of other persons, might under some circumstances be proper, and are therefore subject to explanation by other facts. They are badges of fraud, not fraudulent *per se*; and though a court of equity might from such provisions deduce the ultimate fact of the fraudulency of the assignments, the Texas courts, as they do not possess this power, cannot declare such assignments void without the aid of a jury. *Id.*
15. **DELAY OF CREDITORS CONTEMPLATED MERELY AS INCIDENT DOES NOT AVOID ASSIGNMENT** for benefit of creditors, and it is therefore erroneous to instruct jury that "if they believe from the evidence that the deed of assignment was made by Salles with an intention on his part to protect his goods from legal process on behalf of his creditors, or to delay the creditors in the collection of their debts, the deed would be void;" for the alternative should have been submitted to the jury whether the debtor contemplated the delay of creditors, as the object and purpose of his assignment, or only as a necessary incident thereof. *Id.*
16. **ASSENT OF CREDITORS TO GENERAL ASSIGNMENT WILL BE PRESUMED** so as to give it effect, though they may know nothing of it when it is made, though when made with a fraudulent intent, such assent will not be presumed, and the deed will be void though the fraudulent intent was unknown to the trustee. *Id.*
17. **RESERVATION OF PROPERTY NOT CONVEYED DOES NOT VITIATE ASSIGNMENT FOR BENEFIT OF CREDITORS**, for the property, if not exempt from

execution, is still liable to be taken by creditors, the same as if no assignment had been made. It is but a badge of fraud subject to be explained or accounted for, and is important or unimportant evidence tending to establish fraud or not, according to the circumstances of the case. *Id.*

See JUDGMENTS, 14.

ASSIGNMENT OF CONTRACTS.

1. LESSOR'S RIGHT TO RECOVER RENT reserved in a lease in fee containing covenant for payment, and his remedies for enforcing payment, are assignable (by force of N. Y. Laws 1805, c. 98, sec. 3, if not at common law) with effect to enable the assignee to proceed in his own name. *Van Rensselaer v. Hays*, 278.
2. ASSIGNMENT OF MERE EXPECTANCY will be given effect in equity, not as a grant, but as a contract, entitling the assignee to a specific performance as soon as the assignor has the power to perform it. *McDonald v. McDonald*, 434.

See BANKS AND BANKING; BONDS, 7, 8; CONSTITUTIONAL LAW, 2; NEGOTIABLE INSTRUMENTS, 20.

ASSUMPSIT.

See EVIDENCE, 1; INSURANCE, 5.

ATTACHMENTS.

1. PARTY TO BE ENTITLED TO ATTACHMENT MUST HAVE PRESENT SUBSISTING DEBT against the person whose property he attaches, and therefore an accommodation acceptor of a bill of exchange is not entitled to an attachment against the drawer until after payment of the bill by him. *Hederson v. Thornton*, 70.
2. COURT OF EQUITY MAY, AT SUIT OF CREDITOR, ANNUL JUDGMENT IN ATTACHMENT rendered against his debtor in favor of a plaintiff who was not a creditor at the time the attachment issued, where the debtor's property is not sufficient to satisfy that and the attachments of other creditors founded on valid debts then subsisting. *Id.*
3. ONE GROUND OF ATTACHMENT is sufficient to maintain a writ that has been issued on two grounds. If one ground is proved and the other cannot be, the writ will be upheld. *Tucker v. Frederick*, 139.
4. ATTACHMENT PROCEEDINGS AGAINST ABSCONDING DEBTOR CAN ONLY BE REGARDED out of the jurisdiction as proceedings against property, and property not within the jurisdiction cannot be affected. *Owen v. Miller*, 502.
5. PROPERTY IS IN THAT STATE WHERE MAKER OF NOTE RESIDES, and not in state where note is held; and therefore the seizure and sale of an undorsed promissory note payable to order, in one state, under attachment proceedings against the payee as an absconding debtor, will not divest his property in the debt, evidenced by the note, in another state, where the maker resides. *Id.*
6. SALE OF PROMISSORY NOTE UNDER ATTACHMENT PROCEEDINGS IS UNAUTHORIZED by the statutes of New Jersey, *Nixon's Digest*, 38, it seems, and is void. Such sale does not, therefore, affect the payee's right to recover

the debt from the maker, nor is the assignee entitled to a credit for the amount received on the sale, and applied to the payment of the debts of the payee. *Id.*

7. ASSIGNEE OF NOTE AT INVALID SALE UNDER ATTACHMENT PROCEEDINGS gets no aid from the Ohio act of 1848, "for the protection of purchasers at judicial and tax sales." *Id.*
8. SERVICE OF GARNISHMENT ON ONE MEMBER OF FIRM indebted to the defendant in execution is notice to all members of the firm, and such firm as garnishee is not discharged from liability to the execution creditor by reason of payment of the debt to the debtor by a partner who was ignorant of the service of the garnishment. *State, Use of Arnold, v. Lineweaver, 757.*

See CRIMINAL LAW, 17, 18; EXECUTIONS, 11.

ATTORNEY AND CLIENT.

- IN NEW HAMPSHIRE, NO WRITTEN WARRANT IS NECESSARY to authorize an appearance by a regular attorney; and until the contrary appears, his authority will be presumed. *Bunton v. Lyford, 144.*

See JUDGMENTS, 19, 20; MALICIOUS PROSECUTION, 3.

ATTORNMENT.

See LANDLORD AND TENANT, 1.

AUCTIONS.

1. AT PUBLIC AUCTION SALE OF LAND, VENDOR MAY, UNKNOWN TO BIDDERS, privately depute a third party to attend the sale, and bid progressively for the property on his account, as a defensive precaution to prevent it being sold at an under-value; but the employment of a number of persons as puffers to make fictitious biddings, with the view of taking advantage of the eagerness of buyers, to raise the price, and not as a defensive precaution, if the purchaser is actually misled, is fraudulent, and avoids the sale. *Davis v. Petway, 789.*
2. VENDOR PUBLICLY RESERVING RIGHT TO MAKE ONE BIDDING and no more through a person named, if he secretly employs others to make general and repeated biddings, is guilty of such fraudulent conduct as will entitle the purchaser to abandon the contract. *Id.*
3. ADVERTISING THAT SALE IS TO BE WITHOUT RESERVE excludes all interference by the vendor or others for him, with the right of the public to have the property sold to the highest bidder, and any arrangement by him, with others, the result of which will be to prevent a sale under a fixed sum, will operate to avoid the sale. *Id.*

See JUDICIAL SALES.

AUDITA QUERELA.

See EXECUTIONS, 5.

AWARDS.

See ARBITRATION AND AWARD.

BAILMENTS.

See AGISTERS.

BANK BILLS.

See PAYMENT; WITNESSES, 8.

BANKRUPTCY AND INSOLVENCY.

See FRAUD; MORTGAGES, 12; SHERIFFS, 2, 3.

BANKS AND BANKING.

BANK CHARTER PROVISION AUTHORIZING BANK to hold such real property as should be purchased by it at sales upon judgments, decrees, and mortgages for debts due to it, does not authorize the bank to take an assignment of the right of a purchaser at a sheriff's sale of real property of a judgment debtor of the bank, where such sale was made on an execution on a senior judgment in favor of a third party, and the time for redemption from the sale had passed. *Chautauque Co. Bank v. Risley*, 347.

BASTARDS.

See PARENT AND CHILD.

BATTERY.

See ASSAULT AND BATTERY.

BIDS.

See AUCTIONS; JUDICIAL SALES; SET-OFF.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCEPTIONS.

See PLEADING AND PRACTICE, 15.

BONA FIDE PURCHASERS.

See BONDS, 4; PLEADING AND PRACTICE, 14.

BONDS.

1. **BONDS OF RAILROAD COMPANY ARE NOT MADE VOID BY BEING SECURED BY MORTGAGE** which the company had no power to execute. Nor is the holder's right to recover on such bonds at all affected by a memorandum thereon that they were issued by the company in accordance with its charter, and that the mortgage therein recited had been duly executed. *Phila. & S. R. R. Co. v. Lewis*, 574.
2. **COUPON BONDS, SUCH AS ARE ORDINARILY ISSUED by municipal corporations in aid of construction of railroads, are negotiable instruments; and a person who acquires them from the railroad company, for value and in reliance upon an official certificate which they contain of the facts authorizing them to be issued, is entitled to recover upon them, notwithstanding matters of defense which the municipality might raise against the company.** *Bank of Rome v. Village of Rome*, 272.

2. **FAILURE OF CONSIDERATION OR FRAUD AS DEFENSE TO BOND IS NOT MADE** out by evidence that it was given by a father for the debts of his sons, and that no time for the payment of the debts was given upon the execution of the bond, which itself recited that time had been given. Such evidence is therefore inadmissible in an action on the bond. *Fulton v. Hood*, 664.
 4. **BONA FIDE PURCHASER OF BONDS OF RAILROAD COMPANY IS NOT BOUND** TO SEE TO APPLICATION of the money paid for them to the purposes of the corporation, where the bonds are in such form as to pass by delivery. Nor is it any defense to an action on such bonds that the books of the company do not show value received for them, or that the president of the company has not made to it a return of the proceeds. *Phila. & S. R. R. Co. v. Lewis*, 574.
 5. **OBIGEE MAY, AFTER DEFAULT, MAINTAIN ACTION ON BOND BEFORE HE** IS DAMNIFIED, if the obligation of the bond is for the performance of an affirmative act; but if the obligation is simply to indemnify, damages must be shown before he can recover. *Wilson v. Stilwell*, 477.
 6. **CREDITORS OF FIRM ARE PROPER PARTIES DEFENDANT IN ACTION ON BOND** given by one member of a firm to a retiring member to save the latter against the outstanding obligations of the firm. *Id.*
 7. **ASSIGNMENT OF PRISON-BOUNDS BOND CAN ONLY BE MADE TO PLAINTIFF** IN EXECUTION, under the South Carolina act; and a previous attempt to assign it to another is a nullity and may be disregarded. *Wicker v. Pope*, 732.
 8. **VALUE OF ARTICLES MENTIONED IN SCHEDULE** filed under the South Carolina prison-bounds act is immaterial when no assignment of the property, or offer to assign, is shown. *Id.*
- See CORPORATIONS, 2, 14; DURESS; EVIDENCE, 6, 7; FRAUD, 5, 6; GIFTS; MERGER.

BOUNDARIES.

See HIGHWAYS; WITNESSES, 2.

BROKERS.

BROKER EMPLOYED AS MEMBER OF STOCK EXCHANGE TO PURCHASE STOCKS is, in the absence of a special undertaking, authorized to purchase according to the usages of the board. His principal cannot complain that he took the shares in his own name and mingled them with other shares of the same kind, if such was the custom of brokers at the time and place. So held where there was some evidence that the principal knew the usages in question and did not disapprove them. *Horton v. Morgan*, 311.

See FRAUD, 1.

BURDEN OF PROOF.

See EVIDENCE, 1; NEGLIGENCE, 5, 7, 8; NEGOTIABLE INSTRUMENTS, 24; SHERIFFS, 2.

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COMMON CARRIERS.

1. RAILROAD COMPANY IS BOUND TO PROVIDE SAFE AND SOUND CARRIAGE for the transportation of passengers. Nothing exempts it from this responsibility but the existence of latent defect which no reasonable degree of human skill and foresight could guard against. This obligation extends to every species of appliance used by the company in the business in which it is engaged. *Curtis v. R. & S. R. R. Co.*, 258.
2. RAILROAD COMPANY IS BOUND TO TRANSPORT SAFELY, or to respond in damages, except when the injury has resulted from the act of God, or the concurring negligence of the party complaining. *Powell v. Pa. R. R. Co.*, 564.
3. RAILROAD COMPANY IS BOUND TO EMPLOY ALL NECESSARY OFFICERS AND AGENTS, and to instruct them in their respective duties, so as to secure to the public a safe transportation. *Id.*
4. PUBLIC IS ENTITLED WITHOUT DISTINCTION TO TRAVEL UPON RAILROADS, but it is entitled to do so only in a particular manner, and in vehicles controlled and managed by the company. This control and management extends to every part of the service. *Id.*

5. COMMON CARRIERS ARE RESPONSIBLE AS INSURERS for the safe transportation and delivery of goods received by them for carriage, and can only excuse a default when occasioned by act of God or public enemies. *Welsh v. P. etc. R. R. Co.*, 490.
6. COMMON CARRIERS CANNOT EXEMPT THEMSELVES BY SPECIAL CONTRACT FROM LIABILITY FOR NEGLIGENCE, although they may thus limit their extraordinary responsibility as insurers of the goods received by them for carriage. This rule applies with peculiar force to railroad corporations. *Id.*
7. RELEASE SIGNED BY SHIPPER EXONERATING RAILROAD COMPANY from liability for injury sustained to live-stock during transportation does not excuse negligence on the part of the company. *Powell v. F. & R. R. Co.*, 564.
8. IT IS NEGLIGENCE ON PART OF RAILROAD COMPANY to allow straw to be used in its cars for bedding; and if a fire occur from such use, occasioning the loss of live-stock while being transported, the company is liable for all loss sustained by the shipper. *Id.*
9. COMMON CARRIER IS BOUND TO PROCEED WITHOUT DEVIATION from the usual and ordinary course to the place of delivery, under a bill of lading intended as a contract to deliver goods at a certain place. *Bennett v. Byram*, 90.
10. COMMON CARRIER IS BOUND TO DELIVER GOODS to the consignee in safety at all events, excepting the act of God, the public enemies, and the act or conduct of the owners. *Id.*
11. RAILROAD COMPANY IS LIABLE FOR DAMAGES CAUSED BY DELAY in transporting freight, though such delay was the result of a strike among its servants which rendered the running of trains impossible, of which strike the company had two days' previous notice. *Blackstock v. N. Y. & E. R. R. Co.*, 372.
12. COMMON CARRIER IS BOUND TO MAKE DELIVERY in a reasonable time and with reasonable expedition, when no time of delivery is specified in the contract. But what is a reasonable time must be determined under all the circumstances with a view to the condition of the river, the season of the year, the state of the weather, etc. *Bennett v. Byram & Co.*, 90.
13. OBLIGATION OF COMMON CARRIER TO DELIVER goods according to his contract is suspended only during any temporary obstruction. Hence, he is bound, notwithstanding the hinderance of navigation by low water, to deliver the goods in safety as soon as he can by reasonable diligence, after the removal of the unavoidable cause of delay. *Id.*
14. OBLIGATION OF COMMON CARRIER TO DELIVER at all events may, under certain circumstances, be excused, as, if the owner or shipper is induced from any cause to accept the goods short of the place to which they were first intended to be conveyed, the carrier is not only discharged from further liability, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued. *Id.*
15. DELIVERY BY COMMON CARRIER IS EXCUSED, and he is discharged from further liability, by an acceptance of the goods voluntarily from a warehouseman, and paying the charges for storage, the party so accepting knowing that the voyage has been abandoned on the account of low water. *Id.*

16. DELIVERY OF GOODS UPON WHARF AT PUBLIC PORT, with notice thereof to consignee, there being no contract for any particular mode of delivery, is sufficient to discharge from liability common carriers by water in the internal coasting and river trade. *Dean v. Vaccaro*, 744.
17. NOTICE TO CONSIGNEE OF ARRIVAL OF GOODS IS NECESSARY, and will not be excused by the fact that a custom of delivering goods to public draymen prevails at the port. *Id.*
18. MEASURE OF DAMAGES IS NET VALUE OF GOODS AT PLACE OF DELIVERY, where a common carrier becomes liable by failing to deliver the goods or by delivering them at the wrong place. *Id.*
19. DUTY OF COMMON CARRIERS TOWARDS GOODS which the consignee refuses to receive is to act, so far as he can, consistent with his right to collect his freight and preserve his lien therefor, in the interests of the consignor. If he acts as any prudent man would with his own affairs, he will be held harmless. *Steamboat Keyton v. Motes*, 123.
20. CUSTOM WHICH DISREGARDS THIS RULE would be unreasonable and unjust to shippers, and they are not bound by it. *Id.*
21. CARRIER WHO RECEIVES GOODS UPON UNDERTAKING TO DELIVER THEM TO ANOTHER CARRIER for further transportation continues liable as carrier until they are received by such second carrier, or until he in some way distinctly renounces responsibility; as, by depositing them in warehouse. Notifying the second carrier to take the goods, which he does not do, is not a discharge. *Goold v. Chapin*, 398.
22. NEGLIGENCE IS NOT PRESUMED AGAINST RAILROAD COMPANY from the mere fact that a passenger sustained an injury while traveling in the cars. It may be presumed by the jury whenever the nature and attendant circumstances of the casualty show that it probably resulted from some defect in the road, cars, machinery, etc.; the passenger suing for damages is not required to trace his injury to the precise cause. *Curtis v. R. & S. R. R. Co.*, 258.
23. PERSON RIDING FREE AND IN BAGGAGE-CAR OF TRAIN, with knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not or would not have been injured if he had remained in the passenger-car. *Washburn v. Nashville etc. R. R. Co.*, 784.

See NEGLIGENCE; RAILROADS.

CONCEALMENT.

See FRAUD.

CONDITIONS.

1. PARTY WHO CLAIMS TITLE DERIVED FROM NON-PERFORMANCE OF CONDITIONS SUBSEQUENT IS BOUND TO SHOW his title complete and perfect. No presumptions will ordinarily be made in his favor; and if he has defeated or prevented the performance by any act or omission of his own, he must fail. He must therefore show that he has done all that he is bound to do, to entitle himself to the performance of the condition. *Whitton v. Whitton*, 163.
2. ONE BOUND TO PERFORM CONDITION MUST DO IT AT HIS PERIL, as a general rule, and the other party is not bound to do anything. *Id.*

3. **CONDITION IS NOT BROKEN** if by its terms it is made the duty of the other party to do any act before the condition is to be performed; such as to give notice of any fact, or to make a demand, etc., and he fails to do it. *Id.*
4. **IN PLEADING BREACH OF CONDITION, WHERE PARTY NOT MAKING SUCH CONDITION IS BOUND TO DO ANY ACT** before the condition is to be performed, he must aver the performance of such act, with the time, place, etc., when these are material, or his title will be deficient. *Id.*
5. **LAW WILL SOMETIMES IMPLY CERTAIN THINGS TO BE DONE BEFORE CONDITION IS BROKEN**, where there is nothing in the terms of the condition which requires the party who claims the benefit of it to do anything; because it would otherwise be out of the power of the other party to perform it. This implication arises from the nature of the contract itself; and in such cases the effect of a neglect to do anything thus implied is the same as if it was expressed. *Id.*
6. **ACT IMPLIED MUST BE DONE, AND ITS PERFORMANCE ALLEGED AND PROVED**, or the party claiming the benefit of a condition can take no advantage of its supposed breach. *Id.*
7. **LAW IMPLIES THAT NOTICE WILL BE GIVEN WHERE CONDITION DEPENDS ON ACT OF PERSON CLAIMING ITS BENEFIT**, of every material circumstance connected with it which is within his peculiar and personal knowledge, or which depends on his choice, and where the other party has no means, or no reasonable means, of arriving at that knowledge except from the party himself. *Id.*
8. **LAW DOES NOT IMPLY THAT NOTICE WILL BE GIVEN WHERE CONDITION DEPENDS ON ACT OF THIRD PERSON**; and the party who is bound to perform is bound to take notice of such act. *Id.*
9. **NO NOTICE IS REQUIRED TO BE GIVEN OR AVERRED WHERE PERFORMANCE OF CONDITION DEPENDS ON anything** to be done by the party entitled to the performance to or with any third person who is distinctly named or designated, or by any such third person to or with him, though it is apparent that what is done is more properly and particularly within the knowledge of the party entitled to the performance; because the one bound to perform may obtain knowledge of it otherwise than from him, and he is bound to take notice of it at his peril. *Id.*
10. **CONDITIONS WHICH INURE TO DEFEAT ESTATE ARE CONSTRUED STRICTLY.** *Id.*
11. **PARTY MUST REQUEST PERFORMANCE OF CONDITION** where it in any way depends on the pleasure of the party bound in what manner or at what time a thing shall be done, or whether it shall be done at all. *Id.*
12. **SPECIAL REQUEST TO PERFORM EXPRESS CONDITION IS UNNECESSARY**, unless it is so expressed in the contract. *Id.*

See MORTGAGES, 4, 5.

CONFESSION OF JUDGMENTS.

See JUDGMENTS, 1-3.

CONFLICT OF LAWS.

PRINCIPLE THAT PERSONAL PROPERTY FOLLOWS DOMICILE OF OWNER HAS NO PROPER APPLICATION where an attempt is made to take it from him

against his consent, but applies only where the claim of the owner comes by his death intestate, or by his voluntary transfer. *Owen v. Miller*, 502.

See ATTACHMENTS, 5

CONFUSION OF GOODS.

See ACCESSION.

CONNECTING CARRIERS.

See COMMON CARRIERS, 21.

CONSIDERATION.

See BONDS, 3; NEGOTIABLE INSTRUMENTS, 25, 26.

CONSTITUTIONAL LAW.

1. ALL JUDICIAL POWER IS BY CONSTITUTION VESTED IN COURTS OF JUSTICE, and its exercise by the legislature is prohibited. *Menges v. Dentler*, 616.
2. STATE LAW MAKING RIGHT OF ENTRY FOR NON-PAYMENT OF RENT ASSIGNABLE (such as N. Y. Laws 1805, c. 98, sec. 3, continued in 1 Rev. L. 1813, 364, sec. 3, and 1 Rev. Stat. 748, sec. 25) may be applied to reservations of rent in conveyances and leases made before passage of the law, without incurring the objection that it impairs the obligation of contracts, and therefore violates the federal constitution. Such a provision affects the remedy, not the contract. *Van Rensselaer v. Hays*, 278.
2. ACT OF ASSEMBLY VALIDATING SHERIFF'S SALE, DECLARED BY SUPREME COURT TO BE INVALID, is unconstitutional and void. *Menges v. Dentler*, 616.

See PROBATE COURTS, 4, 6.

CONSTRUCTION.

See CONDITIONS, 10; CONTRACTS, 1-3; DEEDS, 1; EASEMENTS, 4; INSURANCE, 1-3; PARTNERSHIP, 22; WILLS.

CONTEMPT.

See EXECUTIONS, 7; RECEIVERS, 3.

CONTRACTS.

1. PUNCTUATION MAY AID IN ASCERTAINING TRUE READING OF CONTRACT, but its absence cannot vitiate the contract. *White v. Smith*, 589.
2. WORDS IN WHICH CONTRACT IS WRITTEN MUST BE TAKEN TO EXPRESS MEANING of the parties thereto, and the meaning of the words may be ascertained without the aid of punctuation. *Id.*
3. WORDS OF CONTRACT ARE TO BE TAKEN MOST STRONGLY AGAINST PARTY USING THEM; and he will not be permitted to punctuate them in such a way as to lessen his liability. *Id.*
4. IN ENTIRE CONTRACT TO DELIVER PORK, the seller cannot recover for any of it until the whole has been delivered. *Dale v. Cowles*, 463.
5. ABANDONMENT OF CONTRACT, and what acts will constitute it, are matters of law, and should be decided by the court, not by the jury. *Id.*
6. CONTRACT REMAINS IN FORCE until it is rescinded by mutual consent, or until the opposite party does some act which amounts to an abandonment. *Id.*

7. **CONTRACT TO MANUFACTURE AND FURNISH ARTICLES** from materials to be supplied by the purchaser does not vest the title in him until completion and delivery; and meantime, even though completion is delayed by his unexcused default to furnish the materials as agreed, the articles are at the manufacturer's risk. In the event of their being burned, he cannot recover for labor and materials. *McConile v. New York etc. R. R. Co.*, 420.
 8. **IN ACTION ON QUANTUM MERUIT**, plaintiff need not set up in his complaint the excuse for not fully performing his contract, this being a matter of reply to a defense interposing the contract. *Wolfe v. Howes*, 388.
 9. **BREACH OF CONTRACT MAY BE ASSIGNED AFFIRMATIVELY OR NEGATIVELY BY USING WORDS OF CONTRACT**, provided the affirmation or negation in that form necessarily amounts to a breach; or it may be in words containing the sense and substance of the contract, but they must be co-extensive with it in their import and effect. *Atlantic Mutual F. Ins. Co. v. Young*, 200.
 10. **IF BREACH ASSIGNED IS MORE ENLARGED OR MORE LIMITED THAN CONTRACT ALLEGED**, it is bad on demurrer. Thus when the promise contained in the deposit note given by the insured to a mutual fire insurance company is set out in the declaration as a promise to pay such assessments, and at such times, as may be ordered by the directors, agreeably to the act of incorporation and by-laws of the company; while the breach assigned is enlarged to the non-payment of an assessment ordered by the directors, without averring whether it was made in conformity to the act and by-laws or not; and further enlarged as to time, so that it may include an assessment ordered to be paid on some day subsequent to the commencement of the suit as well as prior, and without alleging the time when it was ordered to be paid—the declaration is bad on demurrer. *Id.*
- See AGENCY, 3, 4; AGISTERS; ALTERATION OF INSTRUMENTS; ASSIGNMENT OF CONTRACTS; BONDS, 1; CONDITIONS; CORPORATIONS; DAMAGES, 5-7; DEEDS; DURESS; FRAUD; GROWING CROPS; GUARANTY; GUARDIAN AND WARD, 5, 6; INSURANCE; LANDLORD AND TENANT; LICENSES; MASTER AND SERVANT; MORTGAGES; PARTNERSHIP; PAYMENT; PLEADING AND PRACTICE, 1; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS; TROVER, 2; USURY; VENDOR AND VENDEE.**

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See COMMON CARRIERS, 23; NEGLIGENCE; SHIPPING, 3.

CONVERSION.

See LICENSES, 3; TROVER, 2, 3.

COPARCENERS.

See ESTATES OF DECEDENTS, 2, 3.

CORPORATIONS.

1. **CORPORATION HAS POWER TO CARRY ON ITS LEGITIMATE BUSINESS** by all legal and necessary means not prohibited by law or by its charter. *Phila. & S. R. R. v. Lewis*, 574.

2. RAILROAD CORPORATION MAY SELL BONDS AT DISCOUNT OR EXCHANGE THEM for iron rails, and its mortgages securing them are not rendered invalid thereby, where it is authorized to borrow money and execute its bonds therefor, and secure the same by pledge or mortgage, and it is provided that the directors might sell or negotiate the bonds at such rates as they should deem best to advance the interest of the company; and such sale should be as valid in every respect as if sold at their par value. *Coe v. C. P. & I. R. R. Co.*, 518.
3. RAILROAD CORPORATION'S PERSONAL PROPERTY IS NOT EXEMPTED from the operation of liens or claims created by its own acts or resulting from judicial proceedings, from the fact that it has executed a mortgage, under authority, of its franchisees and its real and personal property. *Id.*
4. CORPORATION'S POWER TO ACQUIRE AND DISPOSE OF PROPERTY HAS RESTRICTION in the object of the corporation, or in the nature of the property. *Id.*
5. CORPORATION'S RIGHT TO ALIENATE PROPERTY, AND CREDITOR'S POWER TO SUBJECT IT TO DEBTS, stand upon the same footing, in the absence of some statutory exemption. *Id.*
6. RAILROAD CORPORATION IS NOT AUTHORIZED TO SELL PROPERTY which, from its nature, it could not alienate, by a statute providing that "the real and personal property of corporations shall be liable to execution as other property." *Id.*
7. RAILROAD CORPORATION IS NOT AUTHORIZED TO CONVEY ALL PROPERTY WHICH IT MAY ACQUIRE by a statute which empowers it to "acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation." *Id.*
8. RAILROAD CORPORATION CANNOT ALIENATE FRANCHISE TO BE CORPORATION, or to construct and maintain a railroad, and receive compensation for the transportation of persons or property. *Id.*
9. RAILROAD CORPORATION CANNOT ALIENATE REAL PROPERTY acquired and held for the exclusive purpose of the exercise of a franchise which cannot be alienated; as the franchise to be a corporation. *Id.*
10. RAILROAD CORPORATION MAY ALIENATE THINGS REQUISITE FOR ITS USE, after the road is constructed and prepared for use, which cannot be regarded as constituting a part of the real estate, but as personal property; such as locomotives, cars, and the like; and such property is liable to execution for its debts. *Id.*
11. FRANCHISE TO BE CORPORATION, AND THAT TO CONSTRUCT, MAINTAIN, AND OPERATE RAILROAD, ARE DIVISIBLE as regards alienation by the corporation, however they may be for other purposes; and the fact that corporations only, under the law, can exercise the power of eminent domain, which cannot be the subject of grant or sale, is no objection to the transfer to individuals of the latter franchise, if it otherwise appears to be authorized by the legislature. *Id.*
12. RAILROAD CORPORATION IS NOT AUTHORIZED TO PLEDGE OR MORTGAGE the franchise of being a corporation, but may pledge or mortgage the franchise to maintain and operate its road, and its property, whether real or personal, to be subsequently acquired, under statutes empowering it to borrow money and to execute its bonds therefor, and to "pledge, by

mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof." *Id.*

12. RAILROAD CORPORATION'S GENERAL POWERS TO PLEDGE OR MORTGAGE AFTER-ACQUIRED PROPERTY are no greater than those of an individual. *Id.*

14. RAILROAD CORPORATION MAY MAKE INTEREST ON BONDS PAYABLE SEMI-ANNUALLY, where it is authorized to borrow money "at a rate of interest not exceeding seven per cent per annum," and the bonds shall be "payable at such time and places as shall be agreed on by the respective parties so contracting." *Id.*

15. CORPORATIONS ACT THROUGH INSTRUMENTALITY OF OFFICERS AND AGENTS, to whom the authority of the corporation may be delegated so far as may be necessary to effect the purposes of its creation, if not prohibited by the charter. *Washburn v. N. & C. R. Co.*, 784.

16. SUPERINTENDENT OF RAILROAD COMPANY, CLOTHED WITH POWER AND AUTHORITY of board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate executive officer; and his negligent or improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the company's act in its corporate capacity. *Id.*

17. IN SUIT AGAINST ESTATE OF DECEASED STOCKHOLDER FOR PAYMENT OF CORPORATE DEBT, all the living stockholders, and the representatives of deceased stockholders, being interested in the account to be taken, should be made parties defendant to the bill. And if the real estate of such deceased stockholder is sought to be charged, his heirs in case of intestacy, and devisees if there be a will, must also be made parties defendant to the bill. *N. E. Com. Bank v. N. S. Co.*, 638.

18. CREDITOR OF CORPORATION WHO GIVES UP OLD NOTES AND TAKES NEW ONES, after a stockholder has withdrawn from the corporation by making sale of his stock and giving due public notice thereof as required by the charter, thereby releases such stockholder from the debt. *Id.*

19. WHERE CHARTER OF CORPORATION PROVIDES THAT EXECUTIONS AGAINST IT SHALL BE LEVIED ON CORPORATE PROPERTY, and that in case of want of such property, the stockholders, who were such at the time the liability was incurred, shall be liable in their own persons and estates as if the liability had been incurred by them personally, a judgment creditor of the corporation, whose execution has been returned wholly unsatisfied for want of corporate property upon which to levy it, may maintain an action at law for the recovery of his debt against the living stockholders of the corporation liable therefor, as joint contractors or copartners. But a creditor of such corporation, who wishes to pursue the estate of a deceased stockholder, can only do so in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, will construe it to be several as well as joint. *Id.*

20. CREDITOR OF CORPORATION UPON WHOSE STOCKHOLDERS IS IMPOSED JOINT LIABILITY in the nature of that of copartners may pursue the estate of a deceased stockholder liable to his debt, for payment out of the same, without reference to the state of accounts between the stockholders and the corporation, or to their solvency or insolvency, leaving the estate to seek repayment from the corporation, or contribution from those liable to

2. RAILROAD CORPORATION MAY SELL BONDS AT DISCOUNT OR EXCHANGE THEM for iron rails, and its mortgages securing them are not rendered invalid thereby, where it is authorized to borrow money and execute its bonds therefor, and secure the same by pledge or mortgage, and it is provided that the directors might sell or negotiate the bonds at such rates as they should deem best to advance the interest of the company; and such sale should be as valid in every respect as if sold at their par value. *Coe v. C. P. & I. R. R. Co.*, 518.
3. RAILROAD CORPORATION'S PERSONAL PROPERTY IS NOT EXEMPTED from the operation of liens or claims created by its own acts or resulting from judicial proceedings, from the fact that it has executed a mortgage, under authority, of its franchises and its real and personal property. *Id.*
4. CORPORATION'S POWER TO ACQUIRE AND DISPOSE OF PROPERTY HAS RESTRICTION in the object of the corporation, or in the nature of the property. *Id.*
5. CORPORATION'S RIGHT TO ALIENATE PROPERTY, AND CREDITOR'S POWER TO SUBJECT IT TO DEBTS, stand upon the same footing, in the absence of some statutory exemption. *Id.*
6. RAILROAD CORPORATION IS NOT AUTHORIZED TO SELL PROPERTY which, from its nature, it could not alienate, by a statute providing that "the real and personal property of corporations shall be liable to execution as other property." *Id.*
7. RAILROAD CORPORATION IS NOT AUTHORIZED TO CONVEY ALL PROPERTY WHICH IT MAY ACQUIRE by a statute which empowers it to "acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation." *Id.*
8. RAILROAD CORPORATION CANNOT ALIENATE FRANCHISE TO BE CORPORATION, or to construct and maintain a railroad, and receive compensation for the transportation of persons or property. *Id.*
9. RAILROAD CORPORATION CANNOT ALIENATE REAL PROPERTY acquired and held for the exclusive purpose of the exercise of a franchise which cannot be alienated; as the franchise to be a corporation. *Id.*
10. RAILROAD CORPORATION MAY ALIENATE THINGS REQUISITE FOR ITS USE, after the road is constructed and prepared for use, which cannot be regarded as constituting a part of the real estate, but as personal property; such as locomotives, cars, and the like; and such property is liable to execution for its debts. *Id.*
11. FRANCHISE TO BE CORPORATION, AND THAT TO CONSTRUCT, MAINTAIN, AND OPERATE RAILROAD, ARE DIVISIBLE as regards alienation by the corporation, however they may be for other purposes; and the fact that corporations only, under the law, can exercise the power of eminent domain, which cannot be the subject of grant or sale, is no objection to the transfer to individuals of the latter franchise, if it otherwise appears to be authorized by the legislature. *Id.*
12. RAILROAD CORPORATION IS NOT AUTHORIZED TO PLEDGE OR MORTGAGE the franchise of being a corporation, but may pledge or mortgage the franchise to maintain and operate its road, and its property, whether real or personal, to be subsequently acquired, under statutes empowering it to borrow money and to execute its bonds therefor, and to "pledge, by

- mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof." *Id.*
12. RAILROAD CORPORATION'S GENERAL POWERS TO PLEDGE OR MORTGAGE AFTER-ACQUIRED PROPERTY are no greater than those of an individual. *Id.*
14. RAILROAD CORPORATION MAY MAKE INTEREST ON BONDS PAYABLE SEMI-ANNUALLY, where it is authorized to borrow money "at a rate of interest not exceeding seven per cent per annum," and the bonds shall be "payable at such time and places as shall be agreed on by the respective parties so contracting." *Id.*
15. CORPORATIONS ACT THROUGH INSTRUMENTALITY OF OFFICERS AND AGENTS, to whom the authority of the corporation may be delegated so far as may be necessary to effect the purposes of its creation, if not prohibited by the charter. *Washburn v. N. & C. R. R. Co.*, 784.
16. SUPERINTENDENT OF RAILROAD COMPANY, CLOTHED WITH POWER AND AUTHORITY of board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate executive officer; and his negligent or improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the company's act in its corporate capacity. *Id.*
17. IN SUIT AGAINST ESTATE OF DECEASED STOCKHOLDER FOR PAYMENT OF CORPORATE DEBT, all the living stockholders, and the representatives of deceased stockholders, being interested in the account to be taken, should be made parties defendant to the bill. And if the real estate of such deceased stockholder is sought to be charged, his heirs in case of intestacy, and devisees if there be a will, must also be made parties defendant to the bill. *N. E. Com. Bank v. N. S. Co.*, 688.
18. CREDITOR OF CORPORATION WHO GIVES UP OLD NOTES AND TAKES NEW ONES, after a stockholder has withdrawn from the corporation by making sale of his stock and giving due public notice thereof as required by the charter, thereby releases such stockholder from the debt. *Id.*
19. WHERE CHARTER OF CORPORATION PROVIDES THAT EXECUTIONS AGAINST IT SHALL BE LEVIED ON CORPORATE PROPERTY, and that in case of want of such property, the stockholders, who were such at the time the liability was incurred, shall be liable in their own persons and estates as if the liability had been incurred by them personally, a judgment creditor of the corporation, whose execution has been returned wholly unsatisfied for want of corporate property upon which to levy it, may maintain an action at law for the recovery of his debt against the living stockholders of the corporation liable therefor, as joint contractors or copartners. But a creditor of such corporation, who wishes to pursue the estate of a deceased stockholder, can only do so in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, will construe it to be several as well as joint. *Id.*
20. CREDITOR OF CORPORATION UPON WHOSE STOCKHOLDERS IS IMPOSED JOINT LIABILITY in the nature of that of copartners may pursue the estate of a deceased stockholder liable to his debt, for payment out of the same, without reference to the state of accounts between the stockholders and the corporation, or to their solvency or insolvency, leaving the estate to seek repayment from the corporation, or contribution from those liable to

- it. And there is no objection, on the ground of multifariousness, to such creditor's seeking, in the same bill, relief out of the estates of two or more deceased stockholders, which are all liable for his debt. But such creditor's right is only to the surplus of the separate estate of the deceased stockholder after all its expenses and separate debts have been paid. *Id.*
21. WHEN COMMON SEAL OF CORPORATION appears to be affixed to an instrument, and the signature of the proper officers are proved, courts are to presume that the officers did not exceed their authority. *St. Louis Public Schools v. Risley*, 131.
22. PRESUMPTION IS THAT DEED TO CORPORATION authorized to acquire land for some purposes only was taken by it for a lawful purpose; if the actual purpose was illegal, that must be affirmatively shown. *Chautauque Co. Bank v. Risley*, 347.
23. CORPORATION CANNOT BE REGARDED AS RESIDING IN NEW HAMPSHIRE, where it has its place of business in Massachusetts, and is organized under the laws of the latter state. *Bay State Iron Co. v. Goodall*, 219.
24. THAT CORPORATION MAY BE INDICTED IS SETTLED LAW IN TENNESSEE. *L. & N. R. R. Co. v. State*, 778.
25. RAILROAD COMPANIES ARE LIABLE TO INDICTMENT and fine for obstructing public highways contrary to the powers granted in their charter. *Id.*
26. TRESPASS QUARE CLAUSUM FREIGHT MAY BE MAINTAINED AGAINST PRIVATE CORPORATION. *Main v. N. H. R. R. Co.*, 725.
- See AGENCY, 1; BANKS AND BANKING; BONDS, 1, 2; EMINENT DOMAIN; INJUNCTIONS, 1; MORTGAGES, 8; NEGLIGENCE; RAILROADS; STATUTES OF LIMITATIONS, 6, 8.

COSTS.

See EXECUTIONS, 11; NUMERUM, 4.

CO-TENANCY.

1. TENANT IN COMMON CANNOT BY WILL DEVISE HIS INTEREST in specific parts of the common property so as to prejudice his co-tenants. *Whitten v. Whitten*, 163.
2. DEVISE OR CONVEYANCE OF GRANTOR'S INTEREST IN SEVERAL PARTS OF COMMON PROPERTY IS VALID between the devisees or grantees, though it is inoperative as to the other co-tenants. *Id.*
3. ONE TENANT IN COMMON CANNOT, AS AGAINST HIS CO-TENANTS, CONVEY part of the common property in severalty by metes and bounds, or even an undivided share of such part. *Id.*
4. ACTION ON CASE IN NATURE OF WASTE will not lie against a tenant in common in favor of another. *Darden v. Cooper*, 461.

See ESTATES OF DECEASED, 2; EXECUTIONS, 1; PARTITIONS.

COUNTERFEITING.

See CRIMINAL LAW, 6.

COUPONS.

See BONDS, 2.

COURTS.

See JURISDICTION; PROBATE COURTS.

COVENANTS.

1. PURCHASER OF LAND UNDER DEED CONTAINING COVENANTS AGAINST INCUMBRANCES, if he subsequently pays off and discharges any incumbrance, may set off what has been paid by him against the amount due on a mortgage for the purchase-price, if what was paid was actually due, or he had given notice to his vendor requiring him to pay off the incumbrance. *Grant v. Tallman*, 384.
2. MEASURE OF DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES is the amount necessary to buy up the outstanding incumbrance, except in cases of fraud, where the purchaser may recover for the loss of a bargain. *Id.*
3. COVENANTOR CANNOT BE SUBJECTED TO DIFFERENT ACTIONS FOR SAME BREACH OF SAME COVENANT, brought by a number of subsequent grantees. *Wilson v. Taylor*, 488.

CREDIBILITY.

See WITNESSES, 5.

CRIMINAL LAW.

1. SAME ACT MAY CONSTITUTE CRIMINAL OFFENSE AGAINST UNITED STATES, AND ALSO AGAINST STATE in which it is committed, and punishment by the one cannot be pleaded in bar to a conviction by the other. Selling liquor to Indians in the territory of Oregon is such an offense. *Oregon v. Coleman*, 554.
2. IF JURY FAILS TO AGREE UPON VERDICT, upon a trial of a defendant for larceny, before the term of court expires, and when the term expired, they, without agreeing upon a verdict, dispersed, and defendant was also allowed to go at large, it was held that the prosecuting attorney might, without leave of court, cause a *capias* to issue against him, and cause him to be again put on trial. *State v. Tilletson*, 456.
3. EVIDENCE OF GOOD CHARACTER OF ACCUSED OUGHT ALWAYS TO BE SUBMITTED TO JURY with the other facts and circumstances of the case. No precise or definite rule has been laid down by which to determine the weight to which such evidence is entitled in prosecutions for homicide; but it would be going a long way too far to lay it down as a fixed rule that proof of good character is sufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused. *Wesley v. State*, 62.
4. ADULTERY MEANS SEXUAL INTERCOURSE BY MARRIED PERSON with any person not his or her wife or husband. A married man may, therefore, be guilty of adultery with a single woman. *Helfrich v. Commonwealth*, 579.
5. INDICTMENT FOR ADULTERY IS SUFFICIENT, which charges that the accused, having a wife in full life, whom it names, did commit adultery with a woman bearing a different name from that of his wife, without otherwise alleging carnal knowledge, and without averring that the person with whom the crime was committed was not his wife. *Id.*

6. IMITATION OR RESEMBLANCE MUST DECEIVE PERSONS OF ORDINARY OBSERVATION in order to sustain a conviction for passing a counterfeit bank note. *Dement v. State*, 747.
7. EAVESDROPPING IS INDICTABLE COMMON-LAW OFFENSE, and consists in the nuisance of listening under walls or windows or the eaves of houses to hearken after discourse, and thereupon to frame slanderous and mischievous tales. *State v. Pennington*, 771.
8. ONE IS GUILTY OF EAVESDROPPING WHO SECRETLY AND STEALTHILY approaches the room occupied by a grand jury, while they are engaged in performance of their duties, for the purpose of overhearing what is there said and done. *Id.*
9. FALSE AND FORGED ENTRY IN JOURNAL OF FIRM, made by their confidential clerk and book-keeper, with intent to defraud his employers, constitutes forgery. Such forgery may consist in the false addition of one figure in the amount of cash received from bills receivable. *Biles v. Commonwealth*, 568.
10. SLAVE CHARGED WITH HOMICIDE OF HIS MASTER OR OVERSEER cannot show, in defense, the violent and cruel character of the master or overseer in the government of his slaves, nor specific acts of severity and cruelty committed by him. *Wesley v. State*, 62.
11. TO MAKE HOMICIDE JUSTIFIABLE ON GROUND OF SELF-DEFENSE, the danger must be either actual, present, and urgent, or the homicide must be committed under such circumstances as afford reasonable ground to the accused to apprehend a design to commit a felony, or to do him some great bodily harm, and that there is imminent danger of such design being accomplished. *Id.*
12. MERE FEAR, APPREHENSION, OR BELIEF, HOWEVER SINCERELY ENTERTAINED by one man, that another designs to kill him, will not justify the former in slaying the latter, where the danger is neither real nor urgent. *Id.*
13. LARCENY IS FELONIOUS, WRONGFUL, AND FRAUDULENTLY TAKING AND CARRYING AWAY by any person of the personal goods of another, with the felonious intent to convert them to his own use and make them his property without the consent of the owner. *State v. South*, 250.
14. TO CONSTITUTE LARCENY, there must be an intent on the part of the taker to wholly and permanently deprive the owner of his property. *Id.*
15. MERE TAKING OF PROPERTY FOR TEMPORARY PURPOSE only does not amount to larceny. *Id.*
16. LARCENY—QUESTION OF INTENT ON PART OF TAKER, whether to deprive the owner of his property permanently or temporarily, is one of fact for the jury to determine. *Id.*
17. OWNER OF PERSONAL PROPERTY HAS NO RIGHT TO RESIST OFFICER who attempts in good faith to attach it upon process against a third person, although such resistance be necessary to protect the property from being taken by the officer. *State v. Richardson*, 173.
18. IT IS NO DEFENSE TO INDICTMENT FOR RESISTING OFFICER IN SERVING WRIT OF ATTACHMENT that the property did not belong to the individual against whom the process was issued, but to the defendant, who made only sufficient resistance to prevent his property from being taken into the officer's custody. *Id.*

See CORPORATIONS, 24, 25.

CROFFERS.

See DAMAGES, 6.

CURTESY.

1. MAN CANNOT BE TENANT BY CURTESY OF REMAINDER OR REVERSION expectant upon an estate of freehold, unless the particular estate be determined during the coverture. *Reed v. Reed*, 777.
2. MAN CANNOT BE TENANT BY CURTESY OF LANDS WHICH ARE ASSIGNED to a woman for her dower. *Id.*
3. WHERE WOMAN ON WHOM LANDS DESCEND ENDOWS HER MOTHER, afterwards marries, has issue, and dies in the life-time of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed, because the daughter's seisin was defeated by the endowment. *Id.*

CUSTOM.

See USAGE.

DAMAGES.

1. EVIDENCE IS ADMISSIBLE TO PROVE, by way of enhancing damages, the probable expense of the litigation in attorney's fees. *New Orleans etc. R. R. Co. v. Albritton*, 98.
2. DAMAGES RECOVERABLE FOR BODILY SUFFERING incurred by plaintiff through negligence of defendant must be limited to such as the evidence shows has been sustained before the trial, or necessarily and certainly will be sustained in the future. Probability of future suffering does not warrant an enhanced award. *Curtis v. Rochester etc. R. R. Co.*, 258.
3. "VINDICTIVE DAMAGES" is synonymous with "vindictory" or "punitive damages." They are allowed for punishment to defendant for violating the law, and to deter from similar violations. *Smithwick v. Ward*, 453.
4. IN MITIGATION OF PUNITORY DAMAGES, it may be shown that defendant has been convicted and punished for the same offense in a criminal action. *Id.*
5. PROFITS THAT WOULD HAVE BEEN MADE IMMEDIATELY OUT OF CONTRACT may be recovered in an action for the breach thereof; the loss of such profits is not consequential and too remote; they are in the immediate contemplation of the parties when the contract is made. *Hoy v. Grenoble*, 628.
6. MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO EMPLOY PLAINTIFF TO CULTIVATE FARM ON SHARES is what he could have made on the farm. *Id.*
7. INSTRUCTION THAT JURY MAY ALLOW DAMAGES "FOR VIOLATION OF FAITH," upon breach of contract, is erroneous, for such damages, being additional to compensation, would be vindictive. *Id.*

See COMMON CARRIERS, 18; COVENANTS, 3; EJECTMENT, 3; EMINENT DOMAIN; NEGLIGENCE, 9; NEGOTIABLE INSTRUMENTS, 17; TROVER.

DAMS.

See NUISANCES, 4.

DEBT.

See JUDGMENTS, 22.

DECLARATIONS.

See EVIDENCE, 4.

DECREEES.

See JUDGMENTS.

DEEDS.

1. CONSTRUCTION OF DEED FREE FROM AMBIGUITY IS FOR COURT, and not for the jury, but the court, in construing a deed, should look at the circumstances under which it was made, for the purpose of arriving at the intention of the parties. *Cox v. Freedley*, 584.
 2. NO INTEREST IN BUILDING ERECTED UPON ANOTHER'S LAND WITH RESPECT OF REMOVAL PASSES BY CONVEYANCE of the owner's interest in the land, whether the purchaser had notice of the position of the building or not. If he is wronged, his remedy is upon the covenants in his deed. *Dams v. Dame*, 195.
 3. EXECUTION AND DELIVERY OF DEED PASSES TITLE TO LAND, and the return of the deed to the vendor, whatever may be the intention of the parties, will not revert the title in him, but to effect this, a reconveyance is indispensable. *Howard v. Huffman*, 783.
 4. VOLUNTARY DESTRUCTION OR CANCELLATION OF DEED BY GRANTEE, with the intention of defeating his own title, will not of itself revert title in the grantor, but may have that effect upon the principle of estoppel, as a grantee so doing would be estopped from setting up such deed, or showing its contents by parol evidence. *Id.*
 5. WHERE DEED IS SO DEFECTIVELY EXECUTED UNDER POWER IN MORTGAGE as to be void, and is followed by a quitclaim deed from the grantee therein to the mortgagee who sold under the power, the former deed may be corrected by the parties, by interlineations, and both deeds being re-acknowledged and recorded anew as of a subsequent date, may be regarded as redelivered as of the new date, so as to take effect from their redelivery. *Fitzpatrick v. Fitzpatrick*, 681.
 6. PRINCIPLE OF STATUTE "QUIA EMPTORES" (18 Edw. I.), allowing freemen to sell their lands, but subject to the grantee's rendering the services, etc., due to the lord, was a part of the law of the colony and state of New York, before and independent of the law of 1787 abolishing tenures. *Van Rensselaer v. Hays*, 278.
 7. ANNUAL RENT RESERVED BY GRAFT IN FEE containing a clause of distress is a valid rent-charge, notwithstanding the person entitled to it may not be a reversioner. Such charge, though not strictly an estate in the land, is a descendible hereditament. *Id.*
- See AGENCY, 3; ASSIGNMENT FOR BENEFIT OF CREDITORS; ASSIGNMENT OF CONTRACTS; CONDITIONS; CORPORATIONS, 22; CO-TENANTS; COVENANTS; EASEMENTS; EXECUTORS AND ADMINISTRATORS, 1, 3; FRAUDS; FRAUDULENT CONVEYANCES; GROWING CROPS; HIGHWAYS; JUDICIAL SALES, 4; RECEIVERS, 2; VENDOR AND VENDEE.

DEFAULT.

See BONDS, 5; NEW TRIAL, 2.

DEFINITIONS.

See CRIMINAL LAW, 5, 7, 14.

DELIVERY.

See COMMON CARRIERS; CONTRACT, 7; MORTGAGES, 2, 3; SALES.

DEMAND.

See JUDGMENTS, 11, 12; FORCEIBLE ENTRY AND UNLAWFUL DETAINER; NEGOTIABLE INSTRUMENTS.

DEMURRER.

See PLEADING AND PRACTICE, 4, 5.

DESCRIPTION.

See AGREEMENT FOR BENEFIT OF CREDITORS, 12; MORTGAGES, 2, 12; PROBATE COURT, 9.

DEVIATION.

See COMMON CARRIERS, 9.

DEVISES.

See CO-TENANCY; PARTITION, 2; WILLS.

DISCOVERY.

See EQUITY, 3-7.

DISMISSAL.

See NEGOTIABLE INSTRUMENTS, 3.

DISSOLUTION.

See PARTNERSHIP, 24, 25.

DISTRIBUTION.

See ESTATES OF DECEDENTS, 4; EXECUTORS AND ADMINISTRATORS, 7, 8.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

See CONFLICT OF LAWS; CORPORATIONS, 22.

DORMANT PARTNERS.

See PARTNERSHIP, 2.

DOWER.

See CURTESY, 2, 3.

DRAFTS.

See NEGOTIABLE INSTRUMENTS.

DURESS.

1. DURESS AND UNDO INFLUENCE AS DEFENSE TO BOND EXHIBITED BY FATHER FOR DEBTS OF SONS is not made out by proof that the obligee falsely represented to the father that unless the bond was executed the creditors would indict the sons for obtaining goods under false pretences and send them to the penitentiary, and that the father was nearly sixty-six years old, and had a mind easily influenced and excited. Such evidence is therefore inadmissible in an action on the bond. *Fulton v. Hood*, 664.
2. DURESS PER MINAS IS NOT MADE OUT BY PROOF OF THREATS of legal prosecution of defendant's sons. *Id.*

EASEMENTS.

1. RIGHT OF WAY IS APPURTENANT TO LAND, and the right to possession and use of land carries with it the right to use the way. *Chamcell v. Chapman*, 158.
2. RIGHT OF WAY.—UPON DIVISION OF DECEASED PERSON'S ESTATE, the committee appointed by the probate court may, where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares. *Id.*
3. DEED GRANTING RIGHT OF WAY BY REFERENCE TO ACTUAL CONDITION OF PROPERTY, and the manner in which it was used by the owner at the time, is valid; and proof may be introduced to show what roads and passes were in use at the time of the conveyance. *Id.*
4. VALID RIGHT OF WAY IN PASSWAYS AFTER PARTITION is created by probate court committee who assign to one share the "privilege to pass and repass to and from, in and around, the lands assigned to the other shares," in the usual passways. *Id.*
5. RIGHT OF WAY IN PASSWAYS AFTER PARTITION OF DECEDENT'S ESTATE WILL BE LIMITED to such passways as were in existence and in a condition to be used at the time of the partition, and such as were marked on the ground by a distinguishable track, or otherwise so defined as to be fixed in a certain course. Such a right confers no authority to open passways formerly used, but discontinued and closed at the time of the partition. *Id.*
6. PLEA, AFTER PARTITION, ALLEGING RIGHT OF WAY BY PRESCRIPTION IS INSUFFICIENT, although it refers to the immemorial usage of former proprietors, unless it contains a distinct averment that the passway existed and was in use, or in a condition to be used, at the time of the partition; and not leaves it to be inferred that it was closed and discontinued at that time. If defendant alleges that it was necessary for him to remove fences or other obstruction in order to use the passway, he must also allege that the obstruction was placed there since the partition. Plea of usage in former times by owners of the whole land is of no importance, except as it may furnish evidence that there was a passway at the time of the partition. *Id.*

EAVESDROPPING.

See CRIMINAL LAW, 7, 8.

EJECTMENT.

1. IF OUTSTANDING TITLE IS SHOWN OUT OF PLAINTIFF in ejectment, he cannot recover. *Des ex dem. Clegg v. Fields*, 450.
 2. IN EJECTMENT, COURT CANNOT REQUIRE PLAINTIFF TO ELECT to try his cause and rest upon one title when he has two titles to the premises in controversy. He has a right to put both in evidence. *St. Louis Public Schools v. Risley*, 131.
 3. EVIDENCE OF VALUE OF IMPROVEMENTS MADE BY DEFENDANT IS ADMISSIBLE in an action of ejectment, where damages are claimed by the plaintiff. *Root v. McFerrin*, 49.
- See ESTATES OF DECEDENTS, 3; EXECUTORS AND ADMINISTRATORS, 3; JUDGMENTS, 13; PLEADING AND PRACTICE, 6, 14.

ELECTION.

See EJECTMENT, 2; EQUITY, 3.

EMINENT DOMAIN.

1. OWNER OF LAND THROUGH WHICH RAILROAD RUNS IS NOT ENTITLED TO COMPENSATION for the increased rates of insurance which he may have to pay because of the danger to his property from locomotives. *Patten v. N. C. Ry Co.*, 612.
2. FACT THAT OWNER OF LAND TAKEN FOR RAILROAD HAS USE OF OTHER RAILROADS already will not justify the jury in considering that the proposed road will be of no benefit to him. *Id.*
3. JURY, IN ESTIMATING DAMAGES TO OWNER OF LAND TAKEN FOR RAILROAD, cannot consider that by the taking he is deprived of the advantage of keeping off others from his neighborhood, and thus saving himself from the annoyance and risk of their proximity; nor that he will suffer inconvenience and delay by having to convey his manufactures across the railroad, and by reason of the obstruction of trains passing along it. *Id.*
4. INDIVIDUAL PROPERTY IS EXCLUSIVE AS AGAINST INDIVIDUALS, but not as against society. It is not of grace, but of duty, that individual rights yield to social ones. *Id.*

ENTIRE CONTRACT.

See CONTRACTS, 4; JUDGMENTS, 16.

EQUITY.

1. WHILE PENDING HIS RIGHTS IN COURT OF LAW, and resisting the claims of his adversary before that tribunal, a party cannot carry the matter into a court of equity. *Williams v. Sadler*, 421.
2. EQUITY HAS NO JURISDICTION to prevent a second satisfaction of a judgment upon the same execution. *Parker v. Jones*, 441.
3. BILL OF DISCOVERY MAY BE FILED AGAINST DEFENDANT ALONE, notwithstanding the statute provides that such a bill may be filed "against the defendant and other persons," etc. *Bay State Iron Co. v. Goodall*, 219.
4. DEMURRER TO BILL FOR DISCOVERY ON GROUND THAT ANSWERS TO INTERROGATORIES MIGHT SUBJECT defendant to a criminal prosecution will not be sustained. *Id.*

5. WHERE DISCOVERY MIGHT SUBJECT DEFENDANT TO CRIMINAL PROSECUTION, he may, in his answer, insist that he is not bound to make any such discovery. *Id.*
 6. COURT OF CHANCERY MAY ENTERTAIN BILL FOR DISCOVERY of all a man's estate, legal and equitable, and may make all proper decrees to subject the same to the execution of his creditors. *Id.*
 7. JUDGMENT CREDITOR MAY DEMAND OF HIS DEBTOR, in general terms, a disclosure of his assets and of the names of his debtors. *Id.*
 8. BILL IN EQUITY SHOULD BE FILED IN COURT WHERE ONE of the parties resides, if both reside within the state; but if the plaintiff does not reside within the state, the bill may be brought in any county therein at his election. *Id.*
 9. POWER OF COURT OF EQUITY TO FIND MATERIAL FACT NOT ADMITTED, by inference and deduction from those that are admitted, does not pertain to the courts of Texas, in cases involving principles of equity, any more than in those involving questions of law. *Baldwin v. Peet*, 806.
- See ATTACHMENTS, 2, 19, 20; FORFEITURES; GUARDIAN AND WARD, 9; INJUNCTIONS; JUDGMENTS, 14, 15; MORTGAGES, 1; NUISANCES; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 5, 7; VENDOR AND VENDEE.

ESTATES FOR LIFE.

See ADVERSE POSSESSION, 3, 4.

ESTATES OF DECEDENTS.

1. TITLE TO REAL ESTATE OF ANCESTOR, ON HIS DEATH, VESTS IMMEDIATELY IN HIS HEIRS, and can only be divested by their own voluntary act, or by the judgment or decree of a competent court, by due course of law. *Root v. McFerrin*, 49.
 2. NO SUBSTANTIAL DIFFERENCE EXISTS BETWEEN COPARCENERS AND TENANTS IN COMMON, under the Mississippi statutes of descent and partition. *Id.*
 3. INTERESTS OF HEIRS IN REALTY OF INTESTATE MAY BE REGARDED AS JOINT AND SEVERAL to some extent, under the Mississippi statutes; while all may join in an action of ejectment, each heir is entitled to his distinct share in severalty. The rights of the one, although connected with are by no means dependent upon and inseparable from the rights of the other. The right of one may therefore be barred by the statute of limitations and that of another be unaffected thereby. *Id.*
 4. DISTRIBUTION OF ESTATE OF INTESTATE is governed by the law in force at the time of the distribution, though passed after the death of the intestate. *Armstrong v. Armstrong*, 555.
- See CORPORATIONS, 17, 19, 20; EASEMENTS; EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; PARTITION, 3-6; PROBATE COURTS; SET-OFF.

ESTOPPEL.

See LANDLORD AND TENANT, 2; RECOVERERS, 2.

EVIDENCE.

1. BURDEN OF PROOF DOES NOT BY ANY RULE always rest on some party. Sometimes it depends on the form of the action and the stage of the

cause at which the action arises. In trover, plaintiff may rely on a demand and refusal to deliver the property, and defendant will be put on his defense; but in *assumpsit*, or action on the case, founded on negligence, plaintiff must make out a *prima facie* case as he charges it. *Winston v. Taylor*, 112.

2. MINUTES OF TESTIMONY OF WITNESS, TAKEN BY JUDGE IN COURSE OF TRIAL had before him, are admissible in another case, in which such witness is a party, as evidence of an admission made by him in such testimony, when the judge testifies that such minutes were made by him at the trial, and that he believes them to be correct, although he also swears that he does not recollect the testimony of the witness, and that the minutes fail to recall it to his memory. *Fitzpatrick v. Fitzpatrick*, 681.
3. CONTENTS OF TELEGRAM CANNOT BE PROVED BY TESTIMONY OF PERSON TO WHOM IT IS SENT, without producing the original or accounting for its absence. *Williams v. Brickell*, 88.
4. DECLARATIONS OF DEFENDANT made after proceedings commenced against him are not admissible in evidence to explain away the effect of previous declarations. *Tucker v. Frederick*, 139.
5. EVIDENCE FROM WHICH ARISES FAIR AND LEGITIMATE INFERENCE OF FACTS SUFFICIENT TO JUSTIFY VERDICT for the plaintiff must be submitted to the jury; but if there be no such evidence, a judgment of nonsuit may be properly entered. *Baker v. Lewis*, 598.
6. PAROL EVIDENCE CANNOT BE ADMITTED TO ADD TO CONDITIONS OF BOND or to contradict its provisions, and in action on a bond it is not permissible to prove that it was stipulated at the execution of the bond that notes given for the same debt should be surrendered in a few days, and that the notes had not been surrendered, but on the contrary, three of them had been put in suit. Such an agreement might be a defense to the suits on the notes, but not to the suit on the bond. *Fulton v. Hood*, 664.
7. PAROL EVIDENCE IS NOT ADMISSIBLE IN BEHALF OF OBLIGOR of bond and warrant of attorney to prove an agreement made at the time of its execution that judgment should not be entered up for a certain period except upon a specified contingency, for this would contradict the terms of the warrant of attorney. Otherwise, however, in favor of a junior execution creditor, for as between judgment creditors there is no contract in writing to be varied by parol. *Id.*
8. OBTAINING PAPER FOR ONE PURPOSE AND USING IT FOR DIFFERENT AND UNFAIR PURPOSE is fraudulent, and the subsequent abuse will open the door for the admission of parol evidence of what took place at the execution of the instrument; but until the abuse or perversion of the instrument is shown, no fraud appears sufficient to make way for the admission of parol evidence to affect it. *Id.*
9. EXPERT TESTIMONY IS ADMISSIBLE AS CORROBORATIVE OF DIRECT TESTIMONY to prove that the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. *Id.*

See ASSAULT AND BATTERY, 1; BONDS, 3; CRIMINAL LAW, 3; DAMAGES; EJECTMENT, 3; EXECUTORS AND ADMINISTRATORS, 2; FRAUD, 2, 3, 5, 6; GROWING CROPS, 1; JUDGMENTS, 6, 7, 11, 12; NEGLIGENCE, 5, 8; PARTNERSHIP, 22; PLEADING AND PRACTICE, 7, 8, 10; PROBATE COURTS, 7, 8; SALES, 9; TRUSTS, 1; VENDOR AND VENDEE, 3; WITNESSES.

EXCEPTIONS.

See INSURANCE, 1, 2

EXCHANGE.

See CORPORATIONS, 2.

EXECUTIONS.

1. LEVY UPON CO-TENANT'S INTEREST IN PART OF LAND HELD IN COMMON IS VOID as against the other co-tenants. *Whitton v. Whitton*, 163.
 2. DEBTOR WHOSE CLAIM TO EXEMPTION IN LANDS LEVIED ON IS DISREGARDED by the sheriff, who, without appraisement, proceeds to sell the lands, is not entitled to any portion of the proceeds. His sole remedy is against the sheriff. *Marks's Appeal*, 631.
 3. TO ENTITLE DEBTOR, UNDER CLAIM TO EXEMPTION IN LANDS LEVIED ON, to three hundred dollars in money out of the proceeds of the sale, an appraisement must be had, and it must appear that that amount in value of land could not be set off to him without injury to or spoiling the whole. *Id.*
 4. MORTGAGE DEFECTIVELY EXECUTED WILL BE PREFERRED TO CLAIMS OF EXECUTION CREDITOR, especially when the levy was made after the property was in the hands of a receiver. *Coe v. C. P. & I. R. R. Co.*, 512.
 5. UPON WRIT OF AUDITA QUERELA, the court issuing an execution will call it in when it has been satisfied, and order the satisfaction entered of record. *Parker v. Jones*, 441.
 6. LEVYING EXECUTION UPON PROPERTY, AND RETURNING IT TO DEBTOR upon his executing a forthcoming bond, is not a satisfaction of such execution. *Id.*
 7. LEVY OF EXECUTION ON PROPERTY IN HANDS OF RECEIVER MAY BE ORDERED WITHDRAWN, and the sheriff compelled to answer to the court for contempt in making it. *Per Gholson, J. Coe v. C. P. & I. R. R. Co.*, 512.
 8. DOCTRINE OF CAVIAT EMPTOR IN RELATION to purchasers at execution sales discussed. *Maguire v. Marks*, 121.
 9. RETURN OF UNSATISFIED EXECUTION MAY BE MADE by sheriff of the county in which the defendant resides. *Bay State Iron Co. v. Goodall*, 219.
 10. CASE AS WELL AS TRESPASS LIES AGAINST OFFICER FOR SELLING DEFENDANT'S PROPERTY under execution, in disregard of his claim to the benefit of the exemption law. *Van Dresser v. King*, 643.
 11. EXECUTION CREDITOR IS LIABLE FOR COSTS OF GARNISHMENT successfully prosecuted against the person summoned, if the funds in the latter's hands are not sufficient to pay the debt and costs, and he has not resisted the proceeding nor appealed from the judgment against him. *State v. Lincolneaver*, 757.
- See ACCESSION; ATTACHMENTS, 8; BANKS AND BANKING; CONSTITUTIONAL LAW, 3; CORPORATIONS, 19, 20; FIXTURES; FRAUDULENT CONVEYANCES, 1; INFUNCTIONS, 2; JUDGMENTS, 5; SHERIFFS, 4.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR'S DEED GIVES COLOR OF TITLE, THOUGH ANTERIOR PROCEEDINGS BE IRREGULAR, and establishes the grantee's right to the use

and enjoyment of the land as against third persons who have no title. *Cheneell v. Chapman*, 158.

2. RECORD MUST AFFIRMATIVELY SHOW THAT NOTICE REQUIRED BY STATUTE WAS GIVEN TO HEIRS, in a proceeding in the probate court by the administrator for the sale by him of the lands of his intestate for the payment of debts, and parol evidence is not admissible, in such case, to supply an omission in the record in that respect. *Root v. McFerrin*, 49.
3. VOID DEED OF ADMINISTRATOR IS ADMISSIBLE UNDER PLEA OF STATUTE OF LIMITATIONS, in an action of ejectment by the heirs against the grantee, to show the fact of possession under it and the *quo antio* with which such possession was taken. *Id.*
4. SETTLEMENT OF ESTATE BY DECREE IN CHANCERY does not bar a bill seeking to reopen the account of the executor on the ground of fraud when the interests of infants were involved in the settlement. *Eliot v. Lancaster*, 749.
5. SALE OF REAL ESTATE OF DECEDENT is not invalidated because the petition for such sale is in the name of the guardian of the minor heirs, nor because the guardian became the purchaser thereof. *Id.*
6. EXECUTOR OR ADMINISTRATOR IS LIABLE FOR DEBTS DUE ESTATE LOST through his gross negligence in enforcing payment. *Charlton's Appeal*, 673.
7. EXECUTOR OR ADMINISTRATOR IS TRUSTEE FOR COLLECTION AND DISTRIBUTION, NOT FOR INVESTMENT, and is liable for want of ordinary diligence in the collection of debts. His duty is unlike that of a guardian who is not bound to sue at once, but may leave the debt where he finds it, unless there is reason to apprehend danger. *Id.*
8. EXECUTOR OR ADMINISTRATOR IS UNDER OBLIGATION TO DILIGENCE IN PREPARING FOR DISTRIBUTION, and cannot be justified in putting forth no efforts to collect a debt due the estate for a period of three, four, or five years. *Id.*
9. WHERE ADMINISTRATOR HAS BEEN SURCHARGED ON EXCEPTIONS TO HIS ACCOUNT, the widow and all the heirs are entitled to participate in the entire fund as finally ascertained, though some of them did not except to the account. *Id.*
10. FOREIGN EXECUTOR OR ADMINISTRATOR CANNOT BE CALLED ON for an account of his administration in the courts of Tennessee. But if he comes within the jurisdiction of these courts, bringing with him funds or property belonging to the trust estate, he may be held to account to that extent, in the character of a trustee for those entitled to the effects in his hands. *Beeler v. Dunn*, 761.

See ESTATES OF DECEDENTS; PLEADING AND PRACTICE, 8; PROBATE COURTS; SET-OFF; STATUTE OF LIMITATIONS, 6; TROVER, 2.

EXEMPLARY DAMAGES.

See NEGLIGENCE, 9.

EXEMPTIONS.

See COMMON CARRIERS, 6, 7; CORPORATIONS, 3, 5; EXECUTIONS, 2, 3, 10.

EXPECTANCIES.

See ASSIGNMENT OF CONTRACTS.

INDEX.

EXPERTS.

See WITNESSES, 6-9.

EXPORTS.

See EVIDENCE, 9.

FALSE REPRESENTATIONS.

See FRAUD.

FENCES.

WORM-FENCE IS FIXTURE, AND PASSES by deed along with the land on which it is built. *Olmer v. Wallace*, 135.

See RAILROADS; FENCES, 2.

FIRE.

See COMMON CARRIERS, 8.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

GAS-FIXTURES ATTACHED TO GAS-PIPES ARE NOT FIXTURES, and do not pass by a sheriff's sale of the real estate. *Vaughen v. Haldeman*, 622.

See DEEDS, 2; FENCES; LOCKSMITHS.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

UNDER FORCIBLE ENTRY AND UNLAWFUL DETAINER ACT, which provides that "a demand in writing is only necessary when any person wrongfully and without force shall obtain and continue in possession of the lands of another," no demand in writing is necessary to entitle a plaintiff to recover, if his tenant hold over after the expiration of his term. *Young v. Smith*, 109.

FORECLOSURE.

See MORTGAGES.

FOREIGN CORPORATIONS.

See STATUTE OF LIMITATIONS, 8.

FOREIGN EXECUTORS.

See EXECUTORS AND ADMINISTRATORS, 19.

FOREIGN JUDGMENTS.

See JUDGMENTS, 21-23; PARTNERSHIP, 23.

FORFEITURES.

FORFEITURES ARE NOT FAVORED IN EQUITY. *Whitton v. Whitton*, 163.

FORGERY.

See CRIMINAL LAW, 9; WITNESSES, 8.

FORMER CONVICTION.

See CRIMINAL LAW, 1.

FORTHCOMING BONDS.

See EXECUTIONS, 6.

FRANCHISE.

See CORPORATIONS, 3, 8, 11, 12.

FRAUD.

1. **BROKER SELLING COMMERCIAL PAPER MUST DISCLOSE ANY FACTS KNOWN TO HIM** adverse to the credit of the parties responsible for the payment of it, irrespective of his opinion upon them; and his failure to do so is a fraud in law, which, if such parties are, in fact, insolvent, constitutes a good defense to an action by the person in whose behalf the paper was sold, against the buyer for the price. *Brown v. Montgomery*, 404.
 2. **FRAUD IN PURCHASING GOODS** for which the buyer knows, but does not disclose, that he has not means to pay, being a question of intent, evidence is admissible that he made other purchases with like concealment; but such other transactions must be so near to the one in suit in point of time, and so like it in other relations, that the same fraudulent motive may reasonably be imputed to all. *Hall v. Naylor*, 269.
 3. **EVIDENCE IS NOT ADMISSIBLE** that the buyer made false statements as to his pecuniary circumstances, with a different object from that of inducing a sale of goods; as, to induce a creditor to forbear pressing for payment of a demand not yet due. *Id.*
 4. **LAW DOES NOT DENY POSSIBILITY OF HONEST PURCHASE OF GOODS** on credit by an insolvent person without a disclosure of the fact of insolvency. The true fact of inquiry is, whether there was a preconceived design not to pay for the goods. This is a question for the jury under all the circumstances in the case. *Id.*
 5. **ONE WHO SEEKS RELEASE FROM OBLIGATION OF HIS BOND ON GROUND OF ACTUAL FRAUD** or misrepresentation must establish that there was a false representation of a matter of substance, important to his interests, and actually misleading him to his hurt. A false affirmation of a matter resting in opinion, or even of a fact equally open to the knowledge or inquiry of both parties, is not available for any such purpose. *Fulton v. Hood*, 664.
 6. **BOND OF FATHER GIVEN FOR DEBTS OF SONS IS NOT INVALIDATED BY FALSE REPRESENTATIONS** of obligee that he had authority to settle the claims of the other creditors of the sons, and that, unless the bond was executed, those creditors would indict the sons for obtaining goods under false pretenses and send them to the penitentiary. Such evidence is therefore not admissible in an action on the bond. *Id.*
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; AUCTIONS, 2; BONDS, 3; DURESS; EVIDENCE, 8; EXECUTORS AND ADMINISTRATORS, 4; MARRIAGE AND DIVORCE, 1; RECEIVERS, 2.

FRAUDULENT CONVEYANCES.

1. **IF TO DEFRAUD CREDITORS** a purchaser of land causes the deed to be given to another person, a resulting trust will arise in favor of the cred-

itors, and the land may be seized and sold on execution, and the purchaser may, upon establishing such facts, have a decree vesting the legal title in himself. *Dunston v. Coy*, 133.

2. CONVEYANCE TO DELAY, HINDER, OR DEFRAUD CREDITORS IS FRAUDULENT and void as to those creditors in New Hampshire; the statute of 29 Eliz., c. 5, having been adopted as a part of the common law of that state. *Robinson v. Holt*, 233.
 3. PURCHASER OR MORTGAGEE OF PROPERTY, taking with knowledge that the vendor or mortgagee intends thereby to defeat, hinder, or delay his creditors, is charged with participation in the fraud, though he may pay full consideration and take immediate and open possession. The transaction is void as to creditors. *Id.*
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; HUSBAND AND WIFE, 1, 2; JUDGMENTS, 5.

GARNISHMENT.

See ATTACHMENTS, 8; EXECUTIONS, 11.

GIFTS.

BOND OR SEALED NOTE DELIVERED AS GIFT CAUSA MORTIS will not be transferred to donee so as to vest title in him, unless it is properly transferred by indorsement also, and where the gift was made simply by a transfer of possession, its value may be recovered at law in an action of trover by the personal representatives of the donor. *Overton v. Sawyer*, 444.

See HUSBAND AND WIFE, 1, 2.

GROWING CROPS.

1. GROWING CROPS ARE PERSONAL PROPERTY, but pass by conveyance with and as appurtenant to the realty, unless severed therefrom by reservation or exception. *Blankenstoss v. Stahler's Adm'r*, 592.
2. VENDOR MAY SHOW BY PAROL EVIDENCE THAT GROWING CROPS WERE RESERVED on a sale of the land, notwithstanding the deed contains no such reservation. *Id.*
3. PAROL RESERVATION OF GROWING CROPS IS SEVERANCE THEREOF, and prevents them from passing as realty under an orphans' court sale of the land. *Id.*
4. RESERVATION OF GROWING CROPS NEED NOT BE BY DEED or in writing; but it is otherwise as to the natural products of the earth, which grow spontaneously, such as trees, etc., a reservation of which must be in writing. *Id.*
5. RESERVATION OF GROWING CROPS GIVES RIGHT TO ENTER and cut and carry them away, and if they are wrongfully taken by the vendee, trover will lie for them. *Id.*

GUARANTY.

GUARANTY WHICH DOES NOT EMBODY ITS CONSIDERATION (as required by the New York statute of frauds, 2 R. S. 135, sec. 2) cannot be sustained by reference to the contract guaranteed, even though such contract be

written on the same paper, and executed at the same time with it, unless it expressly, or by clear implication, refers to such contract as founded on the same consideration. *Droper v. Snow*, 408.

See JUDGMENTS, 8.

GUARDIAN AND WARD.

1. APPOINTMENT OF GUARDIAN OF INSANE PERSON WITHOUT DECREE that he is insane is not valid. *Kimball v. Fisk*, 212.
2. MERE NEGLIGENCE TO RECORD DECREE THAT PERSON IS INSANE will not render an appointment of a guardian for him void. The court may amend the record by entering up such a decree from recitals of it in other papers, upon proper notice to the parties interested. *Id.*
3. IRREGULAR AND ERRONEOUS PROBATE COURT PROCEEDINGS, in appointing guardian of insane person, are not void if the court has jurisdiction of the subject-matter. *Id.*
4. WANT OF NOTICE IN APPOINTMENT OF GUARDIAN renders the proceedings voidable as to parties injured, but not void. *Id.*
5. GUARDIAN WHO CALLS PHYSICIAN to attend professionally upon a slave of his ward is personally liable to him for the bill, although the physician knew when he performed the services that the slave was the property of the ward. *Fessenden v. Jones*, 445.
6. THIRD PARTIES MUST CONTRACT WITH GUARDIAN, and not with the ward; they cannot even contract with the latter for necessaries, except in isolated cases. *Id.*
7. INCOME OF ESTATE IN GUARDIAN'S HANDS IS PROPER FUND for support and education of ward; if such fund be insufficient, a court of chancery may authorize the guardian to encroach upon the principle; but without such power the guardian has no authority so to do. *Beeler v. Dunn*, 761.
8. WHETHER UNAUTHORIZED ACTS OF GUARDIAN IN BREAKING INTO CAPITAL of ward's estate for the latter's support and education, where the interest of such estate was insufficient for the purpose, will be protected and confirmed, if the acts clearly appear to have been for the best interest of the ward, and such as the court would have authorized, *quere.* *Id.*
9. WARD MAY FILE BILL IN EQUITY TO RECOVER SUCH PART OF HIS ESTATE as he can trace, without instituting any proceedings at law where the estate of his guardian is insolvent, and his sureties irresponsible. *Hill v. McIntire*, 229.
10. PERSON RECEIVING PROPERTY OF WARD FROM GUARDIAN WILL BE DEEMED TRUSTEE for the amount, if he took with notice of the trust. *Id.*

HEIRS.

See ESTATES OF DECEDENTS.

HIGHWAYS.

1. DEED OF LAND BOUNDED BY SIDE OF STREET CONVEYS TITLE TO CENTER of the street, although the distances given in the deed bring the line only to the side of the street; and if such street be vacated, the grantee has the right to extend his line to the middle of it. *Oss v. Freedley*, 584.
2. SPACE BY SIDE OF STREET IS NOT SUCH FIXED MONUMENT as will control

the rule that a grantee of land bounded by the side of a street takes to the center thereof. *Id.*

See CORPORATIONS, 25; RAILROADS, 1; WATERCOURSES.

HOMICIDE.

See CRIMINAL LAW, 10-12.

HUSBAND AND WIFE.

1. PARTY HAVING CONTRACTED WITH ANOTHER TO MARRY cannot give away his or her property without the consent of the other party to the marriage contract. *Poston v. Gillespie*, 437.
2. NOTICE TO ONE PARTY TO MARRIAGE CONTRACT that the other has given away property after entering into the contract, but before marriage, will not hinder the injured party from insisting on the invalidity of the gift. *Id.*
3. WIFE'S CHOSES IN ACTION ARE NOT LIABLE FOR HUSBAND'S DEBTS unless he has reduced them to possession in the exercise of his marital rights. *Pierson v. Smith*, 486.
4. RECOVERY OF JUDGMENT IN HUSBAND'S NAME ON WIFE'S PROPERTY is only *prima facie* evidence of an intention to appropriate the same to his own use. *Id.*
5. HUSBAND CANNOT CHARGE HIS WIFE'S REAL ESTATE FOR MONEY which he has expended in making improvements thereon; nor can a mechanic who expends money and labor on the wife's property at the sole instance of the husband so create a charge thereon; and a mechanic's lien for such expenditure is not enforceable. *Knott v. Carpenter*, 779.

See ADVERSE POSSESSION, 3, 4; CURTESY; INSURANCE, 6.

ILLEGAL CONTRACTS.

See CORPORATIONS, 22; DURESS; USURY.

IMPEACHMENT.

See WITNESSES.

IMPROVEMENTS.

See EJECTMENT, 3; HUSBAND AND WIFE, 5; LANDLORD AND TENANT, 6; LICENSES; MASTER AND SERVANT, 2; NUISANCES, 3.

INCUMBRANCES.

See COVENANTS.

INDEMNITY.

See MORTGAGES, 4, 5.

INDICTMENTS.

See CRIMINAL LAW; CORPORATIONS, 24, 25.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS.

INJUNCTIONS.

1. **INJUNCTION WILL NOT BE GRANTED TO RESTRAIN RAILROAD CORPORATION** from the use of its track constructed upon the lands of the complainant, under an agreement whereby the company was allowed to enter upon the complainant's lands and construct its road thereon, and upon failure of the company to make payment for the use of the land within a certain time after an award was made, the license of the company should cease, and any interest of the company under the agreement, and its fixtures and works, should become the property of the complainant. *Coe v. C. P. & I. R. R. Co.*, 512.
2. **EQUITY IN GENERAL WILL RESTRAIN EXECUTION**, but will allow the plaintiff to proceed to a judgment at law. If plaintiff in equity alleges that he believes the answer will afford discovery material to his defense at law, an injunction to stay the trial at law ought to be granted. *Williams v. Sadler*, 424.

See JUDGMENTS, 14, 15, 19; STATUTE OF LIMITATIONS, 7.

INNKEEPERS.

See PHYSICIANS.

INQUISITION.

See INSANITY.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSANITY.

DEFECTIVE INQUIRY OF PARTY AS TO HIS SANITY, in which the selectmen actually find as to his condition, cannot be treated as a nullity. *Kimball v. Fisk*, 212.

See GUARDIAN AND WARD, 1-3.

INSTRUCTIONS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 15; PLEADING AND PRACTICE, 9-11; WITNESSES, 5.

INSURANCE.

1. **IF EXCEPTION IN POLICY OF INSURANCE IS CAPABLE OF TWO INTERPRETATIONS**, equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the insurers. *Western Ins. Co. v. Cropper*, 561.
2. **UNDER EXCEPTING CLAUSE IN POLICY OF INSURANCE** upon the hull, tackle, machinery, and apparel of a steam-propeller, stating that "it is understood that this company is not liable for any breakage or derangement of the engine, or the bursting of the boiler, or any of the parts thereof," the insurers are only relieved from liability to indemnify the assured for broken or deranged machinery, and are not exempt from obligation to pay for a total loss, even though such loss could be traced back to the breaking of the machinery as is first cause. *Id.*

2. MARINE POLICY ON VESSEL "at and from S. M. (a port on the Spanish Main) to New York, which allows the vessel to use three ports" on the voyage from the Main to New York, allows her to touch at ports (not exceeding three) on the Main. *De Peyster v. S. M. I. Co.*, 331.
4. MEMORANDUM CLAUSE IN MARINE POLICY INCLUDES, as totally lost, articles which by having been water soaked in a storm are rendered putrid so that they cannot be carried to the port of destination without endangering the health of the crew, although they retain form and substance enough to be of some value. *Id.*
5. PREMIUMS PAID ON LIFE POLICY may be recovered by the assured from the insurer as money had and received, if the latter wrongfully refuses to receive a premium when due on such policy, and the insured may treat the contract of insurance as at an end. *McKee v. Phoenix Ins. Co.*, 129.
6. POLICY INSURING HUSBAND'S LIFE FOR BENEFIT OF WIFE is not terminated by the wife applying for and getting a divorce from the husband. *Id.*
7. INSURERS ARE LIABLE FOR DAMAGE TO VESSEL INSURED THROUGH COLLISION, that being a peril within the policy, although the collision was caused by the negligence of the master and crew of the insured vessel. *Street v. A. I. & B. Co.*, 714.
8. INSURERS AGAINST COLLISIONS ARE NOT LIABLE FOR DAMAGES, COMPELLED TO BE PAID BY OWNERS OF INSURED VESSEL to the owners of another vessel, because of a collision through the negligence of the master and crew of the vessel insured. *Id.*
9. VALUE OF GOODS LOST OR STOLEN, WHILE BEING REMOVED FROM BUILDING ACTUALLY ON FIRE, may be recovered in an action on a fire insurance policy containing a condition that the insured shall use his best endeavors for saving and preserving the property. *Ind. Mut. Ins. Co. v. Agnes*, 638.

See CONTRACTS, 10; JUDGMENTS, 7; NEGOTIABLE INSTRUMENTS, 1.

INTEREST.

1. RULE FOR COMPUTING INTEREST WHEN PARTIAL PAYMENTS HAVE BEEN MADE.—Cast the interest on the principal to the time of the first payment, and if the payment equal or is greater than the interest, deduct the payment. If the payment does not equal the interest, it is not to be credited until, with the future payments, the interest is equalled or exceeded. *Baker v. Baker*, 243.
2. IF ERRONEOUS RULE FOR CALCULATING INTEREST is adopted with the knowledge and sanction of the parties, though adopted ignorantly, it is a mistake of law. If an erroneous calculation is adopted, it is a mistake of fact. *Id.*

See CORPORATIONS, 14; MERGERS; USURY.

INTOXICANTS.

See CRIMINAL LAW, 1.

JEOPARDY.

See CRIMINAL LAW, 2.

JOINDER.

See PLEADING AND PRACTICE, 1, 2.

JOINT NOTES.

See NEGOTIABLE INSTRUMENTS, 2.

JUDGMENTS.

2. WHERE CONFESSION OF JUDGMENT is by statute required to state concisely the facts out of which the indebtedness arose and to show that the amount thereof is justly due, or to become due, a statement that confession is based upon a note given in consideration of goods, wares, and merchandise sold by plaintiff to defendant before the date of the note, but not stating any time of sale, or any specific kinds of goods, is insufficient as against other creditors. *Bryan v. Miller*, 107.
2. JUDGMENT IS BINDING UPON PARTIES THERETO if entered upon a confession, accompanied by a defective statement. *Id.*
3. AMENDMENT OF DEFENDITS IN STATEMENT ACCOMPANYING CONFESSION of judgment might be made, but not so as to interfere with the rights of other judgment creditors who may have attached in the mean time. *Id.*
4. LIENS OF SEVERAL JUDGMENTS RENDERED AT DIFFERENT TERMS AGAINST SAME DEFENDANT HAVE NO PRIORITY OVER EACH OTHER as regards property, the legal title to which is acquired by defendant after all the judgments have been rendered, and such fund must be distributed amongst them *pari passu*. *Rel'e v. McComb*, 748.
6. JUDGMENT CREDITOR MAY RELY ON LIEN OF HIS JUDGMENT on real property, and on his means of enforcement at law, instead of resorting to equity. Thus, although the debtor has made a prior conveyance, yet the creditor may sell on execution, and the purchaser will have the right of impeaching the debtor's conveyance as fraudulent. And if the creditor's judgment was recovered before other creditors instituted proceedings in equity, nothing in the course or result of those proceedings can affect the rights of the purchaser under the judgment. *Chautauque Co. Bank v. Risley*, 347.
6. JUDGMENT IN REM OF COURT OF ADMIRALTY IS EVIDENCE AGAINST ALL PERSONS INTERESTED in the thing proceeded against. *Street v. A. I. & B. Co.*, 714.
7. LIEN AND DECREE OF COURT OF ADMIRALTY IN PROCEEDING IN REM against a vessel insured, for damage done to another vessel by a collision, is evidence against the insurers of the collision, and of the negligence of the master and crew of the vessel insured, in an action on the policy for a loss occasioned by the negligence. *Id.*
8. RECOVERY OF JUDGMENT AGAINST PRINCIPAL IS NO BAR to an action against him and another on a contract of guaranty executed by them both jointly. *White v. Smith*, 589.
9. JUDGMENT AGAINST TENANT IN TRESPASS TO TRY TITLE DOES NOT CONCLUDE LANDLORD, although the landlord's title was set up as a defense to the action, and the landlord was present at the trial and aided in the defense. *Samuel v. Dinkins*, 729.
10. JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS, obtained in an action against him alone, is a bar to an action against the others. By the

- recovery of such judgment, the promise or cause of action as to the party sued is merged and extinguished "by operation of law, at the instance and by the act of the creditor." *Suydam v. Barber*, 254.
11. JUDGMENT IN ACTION OF TRESPASS QUARE CLAUSUM FREIGHT IS CONCLUSIVE upon the parties to a suit and their privies, as to all matters put in issue in the suit, and either when offered as evidence, if admissible, or when pleaded in bar of a subsequent suit touching the same matters. *Warwick v. Underwood*, 767.
 12. PAROL EVIDENCE IS ADMISSIBLE IN ACTION to show what was involved in the issue and settled by the judgment in a former action, if such judgment is general and uncertain. *Id.*
 13. WHETHER JUDGMENT IN ACTION OF TRESPASS QUARE CLAUSUM FREIGHT, when the title is put in issue, is a bar to an action of ejectment for the same land, *quere*. *Id.*
 14. NON-RESIDENT CREDITORS WILL BE RESTRAINED FROM ENFORCING JUDGMENTS against property assigned for the benefit of creditors, when recovered by them against the assignor after the assignment. *Howard v. Cannon*, 736.
 15. COURT OF EQUITY OF STATE WILL RESTRAIN PARTY WHO HAS OBTAINED JUDGMENT IN UNITED STATES COURT from enforcing his judgment against property not subject to levy and sale. *Id.*
 16. RECOVERY OF PART OF ENTIRE DEBT, in an action at law, will bar the recovery of the residue; nor can it be shown in a subsequent action that there has been a mistake in the calculation of interest. That part of it has thus been left out of the judgment. *Baker v. Baker*, 243.
 17. PRINCIPLE OF EXTINGUISHMENT APPLIES AS WELL TO CASES of judgment by mistake for part of the debt, as to that of a bond accepted by mistake for the whole debt. Both extinguish the whole debt. *Id.*
 18. SATISFACTION OF JUDGMENT MAY BE CANCELED when it appears that the execution upon which it is indorsed was satisfied out of property not belonging to the defendant, and that he has had to refund the money he received to the owner, and has made reparation to him for the injury caused by the wrongful seizure. *Magnere v. Marks*, 121.
 19. JUDGMENT AND EXECUTION RECOVERED AGAINST PARTY by the unauthorized appearance, in his name, of a regular attorney, will not be enjoined, in the absence of proof of collusion. Redress must be sought in an action against the attorney. *Bunton v. Lyford*, 144.
 20. JUDGMENT UPON WARRANT OF ATTORNEY MAY BE SET ASIDE ON MOTION, unless proof of its execution was made, and the original or a copy thereof was on file at the time of the rendition of the judgment. *Knox Co. Bank v. Doty*, 479.
 21. JUDGMENTS OF STATE COURTS are not entitled, under United States constitution, to any higher or other effect in sister states than that which may be claimed for them in the state where rendered, according to her statutes and procedure. *Suydam v. Barber*, 254.
ACTION OF DEBT LIES ON FOREIGN JUDGMENT, notwithstanding it has been appealed from, where the judgment may be executed in the jurisdiction where it has been rendered. *Merchants' Ins. Co. v. De Wolf*, 577.
 22. ACTION ON FOREIGN JUDGMENT IS ORIGINAL INDEPENDENT ACTION, and the judgment therein is conclusive, unless on a reversal of the first judg-

ment the defendant be awarded a right to *audita querela*, or a writ of error *coram nobis* to have the court below reverse its own proceedings, and award restitution, as the case may require. *Id.*

See ACCESSION; ATTACHMENTS, 2; EQUITY, 2; EXECUTIONS; GUARDIAN AND WARD, 2; MARRIAGE AND DIVORCE; PARTITION; PARTNERSHIP, 23; PAYMENT, 2, 3; PROBATE COURTS, 8-11; SET-OFF.

JUDICIAL SALES.

1. ALTERATION BY COURT OF TERMS OF SALE OF DECEDENT'S REAL ESTATE will not relieve from liability a purchaser making default in payment of his bid. *Singerly v. Swain*, 581.
2. OBJECTION THAT PUFFYER WAS EMPLOYED AT ORPHANS' COURT SALE OF REALTY COMES TOO LATE after confirmation, receipt of the deed, and possession taken under it. *Backenstoss v. Stahler's Adm'rs*, 592.
3. LIEN CREDITOR PURCHASING AT ORPHANS' COURT SALE MUST COMPLY WITH REQUIREMENTS of the act relating to executions, in order to entitle him to retain a portion of the purchase-money. *Singerly v. Swain*, 581.
4. DEED EXECUTED BY HEIRS AND WIDOW OF DECEDENT, INSTEAD OF BY ADMINISTRATOR, for the purpose of carrying into effect an orphans' court sale of the land, is a substantial though not technical compliance with the order of court, and does not render the conditions of sale less operative than if the deed had been made by the administrator. *Backenstoss v. Stahler's Adm'rs*, 592.

See ATTACHMENTS, 7; PLEADING AND PRACTICE, 8; PROBATE COURTS, 5, 7-9, 11.

JURISDICTION.

1. NO PRESUMPTION IS INDULGED IN FAVOR OF PROCEEDINGS OF COURT OF SPECIAL AND LIMITED JURISDICTION, but the power to act must appear on the face of the proceedings. *Root v. McFerrin*, 49.
2. COURTS CANNOT, BY JUDGMENT OR DECREE, PASS TITLE TO LAND situate in a foreign country; and therefore a court of another state has no jurisdiction to decree a partition of lands lying in the state of Tennessee. *Johnson v. Kimbro*, 781.

See ATTACHMENTS, 4, 5; EQUITY, 2; PARTITION, 3, 4; PROBATE COURTS; SPECIFIC PERFORMANCE.

JURY AND JURORS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 10, 13, 14; CONTRACTS, 5; CRIMINAL LAW, 2, 16; DEEDS, 1.

JUSTIFICATION.

See CRIMINAL LAW, 12.

LANDLORD AND TENANT.

1. IF TENANT ATTORNS TO PERSON from whom he did not originally lease, the presumption is strong against him that the person to whom he attorned is the successor in interest of his former landlord, and he will be bound by his attornment unless it was procured from him by the fraud.

or misrepresentation of the person to whom he has thus attorned. *Fering v. Smith*, 109.

2. TENANT CANNOT DISPUTE TITLE of his landlord to the leased premises. *Id.*
2. NO NOTICE TO QUIT, NOR DEMAND OF POSSESSION, is necessary when the term of the lease is to end on a certain day, because both parties are apprised of the determination of the lease. The landlord may proceed at once to recover the leased premises. *Id.*
4. NOTICE MAY BE DISPENSED WITH by the agreement between the lessor and lessee. This is a principle of common law, and is applicable to all tenancies. *Id.*
5. TENANCY AT WILL IS TERMINATED BY SALE OF PROPERTY. *Dame v. Dame*, 195.
6. RULES OF COMMON LAW CONCERNING RIGHTS OF LESSOR AND LESSEE IN BUILDINGS, ETC., erected upon leased property may be modified by agreement of parties upon the subject; and so far as such agreement extends, the question is no longer, What is the common law? but, What have the parties agreed? *Id.*

See ASSIGNMENT OF CONTRACTS, 1; CONSTITUTIONAL LAW, 2; DAMAGES, 6; FORCIBLE ENTRY AND UNLAWFUL DETAINER; JUDGMENTS, 8.

LANDINGS.

See SHIPPING.

LARCENY.

See CRIMINAL LAW, 13-16.

LAW OF THE CASE.

See PLEADING AND PRACTICE, 12-14.

LEASES.

See LANDLORD AND TENANT.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LEGITIMACY.

See PARENT AND CHILD.

LEVY.

See EXECUTIONS.

LEX DOMICILII.

See CONFLICT OF LAWS.

LICENSES.

1. WHERE BUILDING IS ERECTED BY ONE MAN UPON LAND OF ANOTHER, by his permission and upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it. In such a case, it is immaterial what is the purpose, size, material, or mode of construction of such building. *Dame v. Dame*, 195.

2. **TROVER WILL LIE FOR VALUE OF BUILDING, ERECTED BY ONE MAN UPON LAND OF ANOTHER**, where the former erected it with authority to remove the same at pleasure; and where the owner of the land afterwards resists such removal, or otherwise converts the building to his own use. Either the builder or his assignee may bring the action. *Id.*
3. **IT IS NO EVIDENCE OF CONVERSION THAT OWNER OF LAND** refuses to deliver up or remove from his premises, upon a demand for that purpose, a building erected there upon an understanding that the builder may remove it at pleasure, because the owner of the land owes no duty to the builder further than not to oppose the removal. *Id.*
4. **TRESPASS IS NOT COMMITTED BY ONE WHO HAS ERECTED BUILDING UPON ANOTHER'S LAND** with permission to remove it when he sees fit, if he, doing no unnecessary damage to the owner, enters upon the land for the purpose of removing it within a reasonable time after the owner of the land withdraws his consent that the building shall remain, or puts an end to the estate at will of the owner of the building in it; because the proprietor of goods and chattels has authority by law to enter the land of another upon which they are placed, and remove them, provided they are there without his default. *Id.*
5. **TRESPASS IS COMMITTED BY ERECTOR OF BUILDING UPON ANOTHER'S LAND BY ENTRY TO REMOVE SUCH BUILDING**, if the owner of the building allows it to remain on the owner's land an unreasonable time after his right of removal has ended, or if such right terminates by his own act before removal. It is his fault that it remains afterwards; and he will be liable for all damage done by him to the owner of the land, but not for the value of the property removed. *Id.*
6. **LICENSE TO CONTINUE BUILDING UPON OWNER'S LAND IS REVOKED** by conveyance of owner's interest in the land, where the builder has put his structure there with a right of removal; but the owner of the building will not be affected by it till notice, either actual or constructive, of the revocation. *Id.*
7. **RESERVED RIGHT TO REMOVE BUILDING ERECTED ON ANOTHER'S LAND IS PERSONAL**, and is not affected by a recovery of the land by an assignee of the owner with notice, whether the buildings were upon the land by right or by wrong. Such a right of removal would give no interest in the land within the statute of frauds, would give no seisin or possession of the land, and would constitute no defense in a real action for the land. *Id.*

See DEEDS, 2; INJUNCTIONS.

LIENS.

See CORPORATIONS, 2; HUSBAND AND WIFE, 5; JUDGMENTS, 4, 5; JUDICIAL SALES, 2.

LIFE ESTATES.

See ADVERSE POSSESSION, 2, 4.

LIFE INSURANCE.

See INSURANCE.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

LOOKOUT.

See SHIPPING, 4.

MALICIOUS PROSECUTION.

1. ACTION FOR MALICIOUS PROSECUTION SUPPOSES BOTH PLAINTIFF'S INTENTION of the charge upon which he has been prosecuted, and also want of probable cause of his guilt. If there be real guilt, or apparent guilt believed by the prosecutor to be real, the most express malice in prosecuting will not support the action. *Bartlett v. Brown*, 675.
2. PARTY PROSECUTING ANOTHER UPON CHARGE THAT HE STOLE, took, and carried away cultivated fruit growing upon the lands of the prosecutor, is not, after the quashing of the criminal complaint, liable to an action for malicious prosecution, where the complaint, though containing words of harsh surplussage, was substantially true. *Id.*
3. ONE WHO FULLY AND FAIRLY STATES FACTS TO HIS COUNSEL, whose candor and skill he has no reason to doubt, on whose advice he signs and swears to a criminal complaint against another, is protected by such advice from an action for malicious prosecution instituted against him after the quashing of the criminal complaint. *Id.*

MARINE INSURANCE.

See INSURANCE.

MARRIAGE AND DIVORCE.

1. DECREE OF DIVORCE A VINCULO IS CONCLUSIVE, AND CANNOT BE REVIEWED upon an original bill on the ground that it was fraudulently obtained. *Parish v. Parish*, 482.
2. DECREE RENDERED IN PROCEEDING FOR DIVORCE, dismissing the libel therefor upon a hearing of the merits, is a bar to a subsequent libel for the same cause of action between the same parties. *Brown v. Brown*, 154.
See HUSBAND AND WIFE; INSURANCE, 6.

MARRIED WOMEN.

See ADVERSE POSSESSION, 3, 4; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. RULE THAT SERVANT CANNOT RECOVER DAMAGES FROM MASTER FOR NEGLIGENCE OF FELLOW-SERVANT does not apply where the two are employed by different masters; as, where an engineer employed by a company owning and running trains is injured by negligence of a switch-tender employed by a different company owning and leasing the road. *Smith v. N. Y. & H. R. R. Co.*, 305.
2. RAILROAD COMPANY'S OBLIGATION TO INTRODUCE IMPROVEMENTS in construction, apparatus, and machinery important to human safety extends in favor of all persons lawfully using its road; it is not limited to passengers holding tickets issued by the company. *Id.*

3. PERSON CONTRACTING TO RENDER HIS PERSONAL SERVICES to be paid for in part during the employment, and the remainder at the end of the term, if he performs services valuable to the employer, but is before the expiration of the stipulated period disabled by sickness from completing his contract, is entitled to recover upon a *quantum meruit* for such services as were rendered by him. *Wolfe v. Howe*, 388.
4. RULE THAT MASTER IS NOT LIABLE FOR INJURY TO SERVANT, caused by negligence of a fellow-servant, is not applicable to a case where the servant injured was not at the time of the injury acting in the service of the master. *Washburn v. N. & C. R. R. Co.*, 784.
5. SERVANT OF RAILROAD COMPANY, IMPROPERLY ABSENT without leave, if received on one of the company's trains, other than that to which he belongs, without objection from the conductor, who is authorized and charged with the duty of excluding all persons not lawfully entitled to be on the train, may recover for an injury caused by a collision while on such train. *Id.*
6. WHETHER RULE THAT MASTER IS NOT LIABLE FOR INJURIES TO SERVANT, caused by the negligence of a fellow-servant, is applicable to servants of railroad companies in different grades of employment, one being subordinate to the other, *quere. Id.*

See AGENCY; CORPORATIONS, 15, 16; DAMAGES, 6; PHYSICIANS.

MECHANIC'S LIEN.

See HUSBAND AND WIFE, 5.

MERGER.

1. WHEN DEBTOR GIVES HIS BOND for the amount reached by the adoption of an erroneous rule for computing interest, and the creditor, with knowledge of the rule adopted, accepts the bond as payment of the debt, and collects the money secured by it, although the whole debt may not be included in the bond, it becomes thereby merged therein, and extinguished by operation of law. Such extinguishment is, at law, complete, final, and conclusive. *Baker v. Baker*, 243.
2. TAKING HIGHER SECURITY FOR DEBT extinguishes those of inferior degree for the same debt.

See JUDGMENTS, 10, 16, 17.

MISREPRESENTATIONS.

See FRAUD.

MISTAKE.

See INTEREST, 2; JUDGMENTS, 16, 17; MERGER; VENDOR AND VENDEE, 2.

MONEY HAD AND RECEIVED.

See INSURANCE, 5.

MORTGAGES.

1. MORTGAGE DEFECTIVELY EXECUTED WILL BE REGARDED IN EQUITY AS CONTRACT TO GIVE MORTGAGE, which the court may direct to be perfected. *Cos v. C. P. & I. R. R. Co.*, 512.

2. AS BETWEEN PARTIES TO RECORDED CHATTEL MORTGAGE in New Hampshire, no formal delivery being required, particular specification and identification of the mortgaged articles is unnecessary to enable the mortgagee to make a selection of such articles from others of like nature belonging to the mortgagor. *Call v. Gray*, 141.
3. DELIVERY OF ARTICLES TO AND POSSESSION BY the mortgagee are not essential to the validity of a chattel mortgage in New Hampshire. Registration in the office of the town clerk where the mortgagor resides is sufficient. *Id.*
4. IF CONDITION OF MORTGAGE IS TO INDEMNIFY MORTGAGEE AGAINST SUPPORT OF THIRD PERSON, it is a sufficient breach that the mortgagee was compelled to pay for such support for a part of the time. *Whitton v. Whittou*, 163.
5. NO NOTICE NEED BE ALLEGED THAT MORTGAGEE, in a mortgage conditioned to indemnify the mortgagee against the support of a third person, has been compelled to pay, because the other party has the means of knowing whether he has paid or made provision for the support of such person independently of the mortgagee. *Id.*
6. CREDITOR OF RAILROAD HAS NO EQUITABLE CLAIM SUPERIOR TO MORTGAGEE, from the fact that the consideration of his debt was for moneys advanced in payment of interest and taxes, and for right of way. *Coe v. C. P. & I. R. R. Co.*, 512.
7. SUBSEQUENT MORTGAGE HAS NO PRIORITY OVER PREVIOUS MORTGAGE DEFECTIVELY EXECUTED to which it was expressly made subject. *Id.*
8. MODE OF SALE OF PROPERTY AND FRANCHISES UNDER MORTGAGE GIVEN BY RAILROAD CORPORATION, and the rights of mortgagees, bond-holders, and creditors thereunder stated. *Id.*
9. POWER OF SALE IN MORTGAGE GIVES SIMPLY EXPRESS PERMISSION TO SELL IN FORECLOSURE PROCEEDINGS, which permission would have been implied, where it authorizes the mortgagee to sell "at public auction, according to the act in such cases made and provided," and the act directs that the proceedings to subject mortgaged premises to sale shall be conducted according to the known usages of courts of equity. *Childs v. Childs*, 512.
10. FORECLOSURE AND SALE OF MORTGAGED PREMISES DO NOT AFFECT RIGHT OF REDEMPTION of the grantee of the mortgagor, who was not made a party to the proceedings. *Id.*
11. SALE ON FORECLOSURE OF MORTGAGE IS NOT VOID, but passes all the mortgagee's rights and interests to the purchaser, where the proceedings are instituted by the mortgagee against the mortgagor alone, after the mortgagor has conveyed away the equity of redemption. *Id.*
12. MORTGAGOR'S GRANTEE ON REDEMPTION MUST PAY AMOUNT DUE ON MORTGAGE DEBT, although the mortgagor has obtained a certificate of discharge in bankruptcy. The certificate only discharges the mortgagor from personal liability upon the debt. *Id.*
13. PURCHASER AT FORECLOSURE SALE IS SUBROGATED TO RIGHTS OF MORTGAGEE to the amount of the purchase-money so paid by him, and is entitled, on redemption, to receive the same with interest. *Id.*
14. PURCHASER AT FORECLOSURE SALE MUST ACCOUNT TO HOLDER OF EQUITY OF REDEMPTION for rents and profits received by him while in possession

- of the mortgaged premises, and is entitled to a credit for improvements made and taxes paid by him. *Id.*
15. NOTICE OF MORTGAGEE'S SALE UNDER POWER IN MORTGAGE IS FATALLY DEFECTIVE when it is not signed by any one, gives neither the name of the mortgagor nor that of the mortgagee, does not give correctly the number of the page in the volume of the records in which the mortgage is recorded, and does not name the auctioneer who is employed to conduct the sale; and notwithstanding a sale under such a notice, a court of equity will decree that the mortgage has not been foreclosed, and permit the mortgagor to redeem. *Hoffman v. Anthony*, 701.
 16. OBJECT OF NOTICE OF SALE UNDER POWER IN MORTGAGE IS TO SECURE ATTENDANCE of purchasers and to obtain a fair price for the property mortgaged, and it is the duty of the mortgagee to see that such notice is given as will reasonably accomplish the end designed. *Id.*
 17. OMISSION IN NOTICE OF MORTGAGEE'S SALE TO NAME TIME AND PLACE of the sale is fatal, and renders such notice invalid. *Fitzpatrick v. Fitzpatrick*, 681.
 18. DESCRIPTION OF LAND IN NOTICE OF MORTGAGEE'S SALE UNDER POWER contained in the mortgage, by a reference to a plat or deed on record, is sufficient; nor is it necessary that such notice be signed by the mortgagee, when the power authorized and required it to be given by the assignee, who might sell under it. *Id.*
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; BONDS, 1; CORPORATIONS, 2, 3, 12, 13; COVENANTS, 1; EJECTMENTS, 4; FRAUDULENT CONVEYANCES, 3; PARTITION; PAYMENT, 5; STATUTE OF LIMITATIONS.

MULTIFARIOUSNESS.

See CORPORATIONS, 20.

MUNICIPAL CORPORATIONS.

See BONDS, 2.

MURDER.

See CRIMINAL LAW, 10-12.

NAVIGABLE WATERS.

See WATERCOURSES.

NAVIGATION.

See SHIPPING; WATERCOURSES.

NECESSARIES.

See GUARDIAN AND WARD, 6.

NEGLIGENCE.

1. PARTY WHO OBSTRUCTS TRACK, OR INTERFERES WITH TRANSPORTATION of a railroad company, cannot recover for an injury received. *Powell v. Pa. R. R. Co.*, 564.
2. CONTRIBUTORY NEGLIGENCE OF INJURED PARTY WILL PREVENT HIS RECOVERY OF DAMAGES from the other negligent party, unless the negligence

- of the latter is so gross as to be equivalent in law to willful injury. *Chapman v. N. H. R. R. Co.*, 344.
2. RAILROAD PASSENGER INJURED BY COLLISION OF TRAINS BELONGING TO DIFFERENT PROPRIETORS MAY RECOVER of the proprietors of the train he is not on, although the managers of the train he is on are guilty of negligence. The negligence of the officers of the train does not extend to or affect the passenger. *Id.*
 4. RAILROAD CORPORATIONS, BOTH CHARGEABLE WITH NEGLIGENCE CAUSING COLLISION of their trains, are liable to a joint action for damages for injuries sustained by a passenger. *Colegrove v. N. Y. etc. R. R. Co.*, 418.
 5. BURDEN OF PROOF, IN ACTION FOR DAMAGES FOR PERSONAL INJURIES resulting from defendant's negligence, is not always upon the plaintiff to affirmatively establish the absence of his own contributory negligence, or upon the defendant to prove the contrary in order to establish his defense; but such facts may be inferred from the circumstances; and the disposition of men to take care of themselves and keep out of difficulty may be properly taken into consideration. *Johnson v. Hudson R. R. Co.*, 375.
 6. IN ACTION FOR PERSONAL INJURY CAUSED BY DEFENDANT'S NEGLIGENCE to carry the case to the jury, the evidence on plaintiff's part must be such as, if believed, would authorize the jury to find that the injury was occasioned solely by negligence of the defendant. *Id.*
 7. WHERE RAILROAD COMPANY WAS RUNNING ITS HORSE-CAR WITHOUT LIGHTS OR BELLS, in the streets of a city on a dark night over a track obstructed by a sewer in process of construction, and it appeared that plaintiff's decedent, a sober cartman, was found dead on such track under circumstances showing that he was struck by defendant's car while groping in the dark for a safe passage for his team, in the absence of any other evidence, there being no witness to the accident, the dangerous tendency of defendant's conduct was such as to authorize the attributing of the accident to the negligence of the defendant and to justify the refusal of a nonsuit, the presumption being that plaintiff had the same regard for his own safety as other men ordinarily have. *Id.*
 8. IN ACTION AGAINST RAILROAD COMPANY, facts that a collision took place, and that plaintiff was injured, are *prima facie* evidence of negligence and want of skill in the party in charge, and casts the *onus probandi* on the defendant to prove that there has been no disregard of duty, and that the damage resulted from a cause which human care and foresight could not prevent. *N. O. etc. R. R. Co. v. Albritton*, 98.
 9. IN ACTION AGAINST RAILROAD COMPANY for injuries sustained by a collision, if it is not shown that the engineer in charge was in every respect qualified, and acted with reasonable skill and the utmost caution to prevent such collision, the defendant is liable for all actual and consequential damages proved, and for exemplary damages, in the discretion of the jury, provided it is proved that plaintiff received bodily injury, caused by the gross negligence, or wanton and willful misconduct, of the engineer. *Id.*
- See AGENCY, 1, 2; AGISTERS; COMMON CARRIERS; CORPORATIONS, 16; DAMAGES, 2; EVIDENCE, 1; EXEMPTIONS AND ADMINISTRATORS, 6-8; GUARDIAN AND WARD, 2; INSURANCE, 7, 8; JUDGMENTS, 7; MASTER AND SERVANT; NEW TRIAL, 2; SHERIFFS; SHIPPING.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE NOT PAYABLE IN ALTERNATIVE.**—A promise contained in the deposit note given by the insured to a mutual fire insurance company, upon the issuing of a policy to him, "to pay to the company, or to their treasurer," the assessments which may be ordered by the directors, is not a promise in the alternative to one of two distinct parties. It is a contract with and promise to the company, and equally so whether described as a promise to pay to their treasurer, or to the company without reference to the treasurer; and a right of action exists in the company alone upon the non-performance of such contract. *Atlantic Mut. F. Ins. Co. v. Young*, 200.
2. **NOTE IS PAYABLE WITHIN REASONABLE TIME AFTER ITS EXECUTION AND DELIVERY**, where the maker promises by it to pay a certain sum of money "when I can make it convenient, with ten per cent interest till paid." *Lewis v. Tipton*, 493.
3. **PLAINTIFF MAY DISMISS ACTION ON JOINT NOTE AS TO ONE MAKER**, even though he be principal, and take judgment against the other. *Wilkinson v. Flowers*, 78.
4. **INDORSEMENT OF NEGOTIABLE NOTE BY PERSON NOT PARTY TO IT**, with intent to give it credit with the payee, renders the person making it liable as an indorser to the payee. *Moore v. Cross*, 323.
5. **NOTICE OF DISHONOR OF PROMISSORY NOTE** must name the maker or it will not suffice to charge the indorser. *Home Ins. Co. v. Green*, 361.
6. **PROTEST MUST BE MADE BY NOTARY FOR COUNTY** in which bill or note is payable, and a protest made by a notary from another county is void, as his authority is confined to the county for which he is commissioned. *Neely v. Morris*, 753.
7. **INDORSEMENT IN BLANK TO SEVERAL PERSONS** enables them to sue jointly, without proving that they are partners, or that the bill was indorsed or delivered to them jointly. *Id.*
8. **INDORSEMENT OF BILL TO FIRM** requires the parties suing on it to show that they constitute the firm. *Id.*
9. **NOTICE OF PAYMENT OF NOTE**, addressed and posted by a notary in good faith to an earlier indorser, upon information received from a later one, will be sufficient to charge the earlier indorser, although the address given was erroneous and he did not receive the notice. *Beale v. Parrish*, 414.
10. **OMISSION TO SERVE NOTICE OF NON-PAYMENT** of a note upon an indorser is excused by the holder's inability to ascertain the indorser's address; but only while his ignorance of the address continues. *Id.*
11. **INDORSER IS BOUND TO KNOW RESIDENCE OF PRIOR INDORSERS**; therefore where an indorser gave his indorsee an erroneous address of a prior indorser, in consequence of which the prior indorser failed to receive notice of non-payment: *Held*, that against the latter indorser the prior indorser was discharged. *Id.*
12. **AGREEMENT BETWEEN HOLDER AND INDORSERS OF PROMISSORY NOTE** made before maturity thereof, for an extension of time of payment, constitutes a waiver on the part of the indorsers of demand and notice, converts their liability into an absolute guaranty, and renders them liable to pay, with or without a subsequent promise or demand upon the maker, at any time. *Amosbag Bank v. Moore*, 153.

13. DRAWER OF BILL IS OBLIGATED TO PAY BILL, if the drawee refuses to pay it when requested to do so, at its maturity, and due notice has been given of its dishonor. If the bill is not properly presented when due, the drawer will be discharged, unless the holder is excused from presenting it. *Adams v. Darby*, 115.
14. HOLDER OF BILL WILL BE EXCUSED FROM PRESENTING IT, if drawer had no right to draw, or had no funds in hands of drawee, or had no expectation of funds there, or the drawee was not obliged to accept, or the drawer, having funds in the drawee's hands during the currency of the bill, had withdrawn the same before the bill matured. *Id.*
15. PRESUMPTION IS DRAWER OF BILL HAD FUNDS IN HANDS OF DRAWER, until the contrary is shown. *Id.*
16. DRAWER OF BILL IS ENTITLED to have it duly presented, and notice of dishonor given, if there was a fluctuating balance between himself and the drawee in the course of their dealings, or he had reasonable expectations that it would be paid, or the drawee had promised to accept it, or had habitually done so without regard to the state of their accounts. *Id.*
17. DAMAGE IS PRESUMED TO HAVE BEEN DONE the drawer if proper presentment is not made, and notice of dishonor given. *Id.*
18. PRESENTMENT IS EXCUSED ONLY WHEN DRAWER HAD NO FUNDS in hands of drawee continuously from the drawing of the bill until after it fell due, and this under such circumstances as to establish that he had no right to expect drawee or any other person to accept or pay. *Id.*
19. PRESENTMENT IS NOT EXCUSED because drawer removed funds from hands of drawee after the bill should have been presented. *Id.*
20. DIRECTION IN BILL TO CHARGE TO PARTICULAR FUND does not give holder an interest in the property out of which the fund arises. *Id.*
21. IF INCUMBENT ON HOLDER TO PRESENT BILL, and he neglects to do so at a proper time, he will lose not only his remedy on the bill, but also on the consideration or debt in respect of which it was given or transferred. *Id.*
22. ACCOMMODATION ACCEPTOR OF BILL OF EXCHANGE DOES NOT BECOME CREDITOR OF DRAWER, until he has actually paid the bill. *Henderson v. Thornton*, 70.
23. NEGOTIABLE NOTE DELIVERED BY PAYEE FOR COLLECTION, AND NOT INDORSED, cannot be, by the collector, transferred, without an express authority from the payee. Possession does not raise a presumption that he has a right to transfer the note. *Hardesty v. Newby*, 137.
24. BURDEN OF PROOF IS ON HOLDER of note to show the proper assignment thereof. *Id.*
25. PARTIAL FAILURE OF CONSIDERATION is a good defense *pro tanto* to a promissory note, where the amount to be deducted on that account is matter to be ascertained by mere computation. But it is otherwise where such amount depends upon the ascertainment of unliquidated damages. *Riddle v. Gage*, 151.
26. WHERE SEVENTEEN ARTICLES WERE SOLD for a certain sum, and five of them that went to make up the consideration for the note in suit were sold to satisfy an attachment existing at the time of the sale and when the note was given: *Held*, that to this extent the consideration for the note had failed; that as no specific value had been fixed to the articles at

the time of the purchase, the value of the five sold was a matter undisputed, and a recovery could be had for the full amount of the note.
Id.

See ALTERATION OF INSTRUMENTS; ATTACHMENTS, 5-7; BONDS, 2; GIFTS; JUDGMENTS, 1; PAYMENT.

NEW TRIAL.

1. ON MOTION FOR NEW TRIAL, both the judgment and pleadings of the parties must appear in the transcript of the record, independent of the bill of exceptions, to enable the appellate court to determine the error assigned. *N. O. etc. R. R. Co. v. Albritton*, 98.
2. COURT WILL RARELY INTERFERE TO ORDER NEW TRIAL ON MOTION OF PARTY WHO HAS HAD DUE NOTICE OF SUIT, employed counsel, and who has been defaulted with the knowledge and consent of his counsel, but through some fault or mistake of theirs. A clear case of accident, mistake, or misfortune must be shown to induce the court to do so. *Dame v. Dame*, 195.
3. AS GENERAL RULE, NO QUESTIONS CAN BE CONSIDERED ON MOTION FOR NEW TRIAL except those that were raised at the trial; but where the facts, as allowed by the judge and conceded by both parties, show a fatal defect in the title of the plaintiff in an action of trespass and ejectment, which could not have been obviated by further proof on his part, the court may, on such a motion, consider the point still open and dispose of the case in such a manner as justice seems to require. *Fitzpatrick v. Fitzpatrick*, 681.

NON-RESIDENTS.

See JUDGMENTS, 14.

NONSUIT.

See EVIDENCE, 5; NEGLIGENCE, 7; PLEADING AND PRACTICE, 16.

NOTARIES.

See NEGOTIABLE INSTRUMENTS, 6.

NOTES.

See NEGOTIABLE INSTRUMENTS.

NOTICE.

See ATTACHMENTS, 8; COMMON CARRIERS, 16, 17, 21; CONDITIONS; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 4, 10; HUSBAND AND WIFE, 2; LANDLORD AND TENANT, 3, 4; MORTGAGES, 5, 15-18; NEGOTIABLE INSTRUMENTS; PARTITION; PARTNERSHIP, 4, 5, 8; PROBATE COURTS, 7, 8; VENDOR AND VENDEE.

NUISANCE.

1. WHERE APPREHENDED NUISANCE IS DUBIOUS OR CONTINGENT, equity will not interfere, but will leave complainant to his remedy at law. *Wilson v. Commissioners*, 430.

2. **BURYING DEAD IN PUBLIC CEMETERIES** is not a nuisance, but might become so by careless and improvident modes of interment. Equity will not interfere unless the nuisance be clear, or has first been established in a court of law. *Id.*
3. **WORKS OF INTERNAL IMPROVEMENT ERECTED BY STATE FOR BENEFIT OF CITIZENS AT LARGE** cannot be regarded as a public nuisance because they render the neighborhood unhealthy by obstructing running water and overflowing adjacent lands; and their character is not changed by placing them in the hands of a private corporation, with a requirement that they be kept up for the purposes for which they were constructed. The corporation occupies the same position as the commonwealth, and is no more indictable for a public nuisance than the commonwealth would be. *Commonwealth v. Reed*, 661.
4. **COURT OF EQUITY WILL NOT RETAIN BILL TO ABATE DAM** which flows plaintiff's lands, until his title is established at law, where there has been a user by the defendant for upwards of forty years, under an alleged claim of right, but will dismiss the bill with costs. *Sprague v. Rhoads*, 678.

OFFICES AND OFFICERS.

See **CORPORATIONS**, 15, 16, 21; **EXECUTIONS**, 2, 10; **SHERIFFS**.

ORPHANS' COURT.

See **JUDICIAL SALES**; **PARTITION**; **PROBATE COURTS**.

PARENT AND CHILD.

CHILD BORN OUT OF WEDLOCK, AND LEGITIMATED UNDER LAW OF ANOTHER STATE, is not thereby clothed with inheritable capacity in Pennsylvania, where the fact of birth in wedlock alone gives the capacity to inherit. *Smith v. Derr's Adm'rs*, 641.

PAROL EVIDENCE.

See **EVIDENCE**, 6-8; **EXECUTORS AND ADMINISTRATORS**, 2; **GROWING CROPS**, 2; **JUDGMENTS**, 12; **PARTNERSHIP**, 22; **SALES**; **TRUSTS AND TRUSTEES**, 1; **VENDOR AND VENDEE**, 3.

PARTIES.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 2; **BONDS**, 6; **CORPORATIONS**, 17; **NEGLIGENCE**, 4; **PARTITION**; **PLEADING AND PRACTICE**, 2.

PARTITION.

1. **MORTGAGEES ARE NOT GENERALLY NECESSARY PARTIES TO BILL FOR PARTITION**; but it is proper to join them where their interests may be impaired. Thus where a tenant in common grants or devises his interest in specific parts of the common property, a mortgagee of the interest of one of such grantees or devisees may be properly made a party to a bill for partition, because his whole security is liable to be destroyed by an assignment of the mortgaged part to the other co-tenant. *Whitton v. Whitton*, 163.
2. **PARTIES TO BILL FOR PARTITION**.—If owner of undivided interest in real estate devise his interest in part of the land to one and in another part to another, both devisees are proper parties to a bill for partition. *Id.*

3. DECREE OF ORPHANS' COURT IN PARTITION OF DECEDENT'S REALTY awarding the land to one of the heirs is conclusive as to the title, and cannot be collaterally impeached, if the court had jurisdiction of the subject-matter, and there be no fraud. *Merkle v. Trapnell*, 634.
4. ORPHANS' COURT HAS JURISDICTION TO DECREE PARTITION OF DECEDENT'S REALTY, notwithstanding a lapse of twenty-six years since his death, if there has been no adverse possession. *Id.*
5. GRANTOR OF ONE OF HEIRS, WHOSE DEED HAS NOT BEEN RECORDED, is not entitled to notice of partition proceedings; nor is the record of a mortgage from the grantee to his grantor constructive notice of title in such grantee. *Id.*
6. IT IS NO OBJECTION TO DECREE OF PARTITION OF DECEDENT'S REALTY that the heirs were not in the actual possession of the premises at the time of partition awarded, if the possession was vacant in fact, for in such case the possession is deemed to be in the heirs. *Id.*

See EASEMENTS; JURISDICTION, 2.

PARTNERSHIP.

1. TWO MEN MUST BE CONSIDERED PARTNERS AS TO THIRD PERSONS, where they are jointly concerned in a transaction under an agreement to share between them indefinitely the profits of the business. *Bromley v. Elliot*, 182.
2. SECRET AGREEMENT OF PARTIES RELATIVE TO THEIR CONNECTION IN BUSINESS is binding between themselves, but will not control their responsibility to others ignorant of such agreement. *Id.*
3. THIRD PERSONS ENTERING INTO SECRET AGREEMENT BETWEEN MEMBERS OF FIRM to share profits are liable as partners. Thus dormant partners who participate in the profits of trade and conceal their names are equally liable, when discovered, as if their names had appeared in the firm, although they were not known to be partners at the time of the creation of the debt. *Id.*
4. THOSE DEALING WITH PARTIES CONNECTED IN BUSINESS ARE BOUND BY their agreements with each other, if at the time they know the nature of those agreements, or have knowledge of such facts or circumstances as would lead a man of common prudence to make inquiry in relation to them. *Id.*
5. IF PERSONS ARE NOT PARTNERS AS BETWEEN THEMSELVES, they cannot be so charged by a third person having knowledge of the fact, or having such knowledge that he is bound to inquire concerning it. *Id.*
6. THOSE WHO SHARE PROFITS OF BUSINESS ARE LIABLE AS PARTNERS to third persons under all agreements within the apparent scope of the business in which they are engaged, unless the limitations of their contracts are known to those with whom they deal, or are such as from the facts known to them they are bound to inquire. No other exception to the general rule can safely be admitted. *Id.*
7. THIRD PERSON LIABLE AS PARTNER WHEN.—One having no knowledge of any partnership, and dealing with a party who shares the profits with a third person, may charge such third person as a partner for all debts contracted within the apparent scope of the business of the party with whom they deal. *Id.*

8. **PERSONS TRANSACTING BUSINESS TOGETHER** may be charged as partners for all debts contracted within the apparent scope of their business, whatever may be their contracts or stipulations with each other, by those dealing with them, and who have no knowledge of their agreements, or knowledge of any fact or circumstance which ought to put them on inquiry. *Id.*
9. **PERSON WHO RECEIVES SHARE OF BUSINESS PROFITS**, by way of salary, or compensation for services, is liable as a partner to third persons, unless the true character of the agreement is known, or the apparent relations of the parties is such as should put parties dealing with them upon inquiry. *Id.*
10. **BROAD RULE THAT "NO PARTNERSHIP WILL BE CREATED AS TO THIRD PERSONS**, if the whole transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of a partnership," is not law, because it falls little short, if at all, of the doctrine that no persons will be liable to third persons as partners unless they are partners as between themselves. *Id.*
11. **IF PERSON TRANSACTS BUSINESS APPARENTLY ON HIS OWN ACCOUNT**, and for his own benefit, another person, who is found to share the profits of the business with him, may be charged as a partner for all debts contracted by the former within the apparent scope of his business, without regard to any private agreements between them. *Id.*
12. **QUESTION WHETHER TWO PERSONS ARE PARTNERS AS TO THIRD PERSONS** will be superseded by a determination of the fact that they are to be regarded as partners between themselves. *Id.*
13. **TWO LEADING PRINCIPLES OF CONTRACT OF PARTNERSHIP** are, a common interest in the stock of the company, and a personal responsibility for the partnership engagements. *Id.*
14. **OWNERSHIP OF PROPERTY IN COMMON** is not necessary to constitute partnership; yet each partner must bring into the common stock something that is valuable. *Id.*
15. **VALID PARTNERSHIP MAY BE CREATED** by one person advancing funds, and another furnishing personal services and skill, in carrying on a trade, if the latter is to share in the profits. *Id.*
16. **PARTNERSHIP IS NOT CONFINED TO COMMERCIAL BUSINESS**. It may exist between attorneys, conveyancers, mechanics, stage-line proprietors, artisans, or farmers, as well as between merchants. It may as well exist between brokers and factors or agents, whose sole employment relates to the property and business of third persons, as well as among those who jointly own the property in which they deal. *Id.*
17. **OWNERSHIP OF GOODS** in which partnership deals may belong to one of the partners exclusively, just as well as to a stranger, without in any way affecting the validity of the partnership. *Id.*
18. **ESSENCE OF CONTRACT OF PARTNERSHIP** is that parties should be jointly concerned in profits and loss, or in profits only, in some honest and lawful business; the relation of partnership being established by the fact that they share the profits between them. *Id.*
19. **PERSONS MAY BE PARTNERS AS TO PROFITS OF BUSINESS** carried on by them jointly, though as to all the property employed in the business they may be several owners. *Id.*

20. THAT PARTIES MUST SHARE PROFITS AS PROFITS, to render them liable as partners, is a distinction too thin to be satisfactory. *Id.*
 21. TERM "NET INCOME" CANNOT BE UNDERSTOOD TO MEAN GROSS PROFIT. *Id.*
 22. PAROL TESTIMONY WILL NOT BE RECEIVED to construe written contract of partnership, or to show the intention of the parties to it. *Id.*
 23. JUDGMENT AGAINST ONE PARTNER on a firm obligation in one state does not bar an action against another partner in another state for the same debt, where both debtors have voluntarily removed themselves out of the state where the debt was incurred, prior to the commencement of proceedings against them. *Wiley v. Holmes*, 128.
 24. ONE CANNOT ABSOLVE HIMSELF FROM LIABILITY ON CONTRACT by retiring from the firm that is a party to such contract, unless the other contracting party consents to his release. *Winston v. Taylor*, 112.
 25. WHERE FIRM RECEIVES STOCK TO BE PASTURED for an indefinite time, if one of the firm retires he may absolve himself from further liability upon the contract by requiring owner to remove his stock. If owner permitted stock to remain after a reasonable time, it would operate as a release to retiring partner. Such defense, however, ought to be clearly made out. *Id.*
 26. PARTNER CANNOT MAINTAIN ACTION IN FIRM NAME to recover certain firm moneys of a person to whom they were paid by another partner for the value of certain goods received by the latter with a knowledge of the fact that they were stolen, though such payment was made in order to prevent a prosecution of the latter for felony, and without the knowledge or consent of his copartner. *Jackson v. Byrty*, 764.
- See ATTACHMENTS, 8; BONDS, 6; NEGOTIABLE INSTRUMENTS, 7, 8.

PASSENGERS.

See COMMON CARRIERS, 22, 23; NEGLIGENCE.

PAYMENT.

1. DEBTOR MUST BEAR LOSS WHERE HE MAKES PAYMENT IN BILLS OF SUSPENDED BANK, although the suspension was not known at the place of payment, nor to either of the parties, if the creditor offers to return the bills without unreasonable delay. *Westfall v. Braley*, 509.
2. VOLUNTARY PAYMENT OF JUDGMENT BY DEBTOR IS BINDING upon him if made with full knowledge of the facts affecting its validity, but otherwise if made in ignorance of these facts. *Knox County Bank v. Doty*, 479.
3. PAYMENT OF JUDGMENT IS NOT VOLUNTARY when it is made to release property held under execution or to prevent property from being seized. *Id.*
4. PARTIAL PAYMENT ON CONTRACT CANNOT BE RECOVERED by a party who has made default in the fulfillment of the contract. *Ashbrook v. Hite*, 463.
5. PAYMENT OF MORTGAGE DEBT IS GOOD DEFENSE TO BILL OF FIDELITY, but the defendant in such suit cannot avail himself of the presumption of payment which the statutory bar of the note secured by the mortgage raises in his favor when an action is brought on the note. To avail himself of the defense of payment, he must in his answer plead it and prove it on the hearing. *Wilkinson v. Flowers*, 73.

6. PAYMENT IN GENUINE BANK NOTES CIRCULATING AS CURRENT IN BRITAIN, and the loss falls upon the receiver where the bank suspends immediately after payment. *Ware v. Street*, 755.
 7. PAYMENT IN BANK NOTES CIRCULATING AND RECEIVED AS MONEY, there being no fraud, cannot be avoided by demand, refusal, and notice of tender to the payor, bank notes not standing on the same ground with negotiable paper. *Id.*
- See ALTERATION OF INSTRUMENTS; ATTACHMENTS, 8; BONDS, 4; CORPORATIONS, 18; INSURANCE, 5; INTEREST; MERGERS.

PERFORMANCE.

See CONDITIONS; CONTRACTS, 8; SPECIFIC PERFORMANCE.

PERSONAL REPRESENTATIVES.

See EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.

PHYSICIANS.

SUPERINTENDENT OF HOTEL AT WATERING-PLACE DOES NOT RENDER HIMSELF LIABLE FOR SERVICES OF PHYSICIAN by sending to a friend in a neighboring town the following telegram, which is by him shown to said physician: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail." *Williams v. Brickell*, 88.

See GUARDIAN AND WARD, 5; WITNESSES, 6.

PILOT.

See SHIPPING, 7.

PLEADING AND PRACTICE.

1. ONLY THOSE CAUSES OF ACTION EX CONTRACTU CAN BE JOINED IN SAME SUIT to which all the parties defendant were originally liable. *N. E. Com. Bank v. N. S. Co.*, 688.
2. OBJECTION ON GROUND OF NON-JOINDER OF PARTIES must be taken by plea in abatement. *Backenstoss v. Stahler's Adm'rs*, 592.
3. WHENEVER "ACTUAL REQUEST" IS NECESSARY TO BE STATED, GENERAL AVERTMENT, "THOUGH OFTEN REQUESTED," is not sufficient. Such request, if essential to the breach, is so also as to the right of action; and it must, therefore, be specially alleged whenever such request is, either by the terms or nature of the contract, the condition of the liability. *Whitton v. Whitton*, 163.
4. DEMURRER IS PROPERLY SUSTAINED when complaint shows action is based upon judgment of court of another state, and that jurisdiction over defendant was acquired by the publication of summons. *Winston v. Taylor*, 112.
5. DEMURRER TO EVIDENCE IS NO LONGER IN USE IN NEW YORK, and a refusal to permit one is not reversible error. *Colegrove v. N. Y. etc. R. R. Co.*, 418.
6. IN ACTION OF TRESPASS AND EJECTMENT, PLEAS OF NOT GUILTY, AND OF SOIL AND FREEHOLD look to the state of things at or before the commencement of the action, and if matter of discharge accrues to the defend-

ant pending the action, it must be pleaded to the further maintenance of the action, if it has arisen after suit, but before plea or continuance, and *pais darrein continuance*, if after plea or issue joined. A defendant in such action cannot, therefore, protect his possession by setting up an outstanding mortgage of the plaintiff's ancestor purchased in by the defendant pending the action, nor by setting up such a mortgage discharged of record before the commencement of the action, but assigned to him pending the action, although he proves that the mortgage was purchased by him before the commencement of the action and discharged by the mistake of the mortgagee instead of being assigned. *Wimpatrick v. Fitzpatrick*, 681.

7. EVIDENCE OF DEFENSE NOT PLEADED cannot be given at trial. *Winston v. Taylor*, 112.
8. OBJECTION TO COMPETENCY AND SUFFICIENCY OF EVIDENCE to establish the title of a party under an administrator's sale, in this, that the record does not show that the sale was confirmed, cannot be raised for the first time in the appellate court; for, if made in the court below, it might have been obviated by sufficient evidence, and a confirmation shown. *Mont v. Horne*, 94.
9. INSTRUCTIONS NOT WITHIN ISSUES made by the pleadings should not be given by the trial court to the jury. *Winston v. Taylor*, 112.
10. IT IS ERROR FOR COURT TO CHARGE JURY UPON WEIGHT OF EVIDENCE, or to assume in its charge that any material fact is proved; but the appellate court will not reverse a judgment on the ground that such assumption was erroneously made, when the fact assumed as proved was so clearly established by the evidence that there was no room for the jury to doubt concerning it. *Wesley v. State*, 62.
11. CASE WILL BE REMANDED ON GROUND OF ERRONEOUS INSTRUCTION when it was given upon an isolated question about which there could be no doubt as to the facts, and it cannot be said with certainty that the jury, in rendering their verdict, considered only the main facts of the case. *Baldwin v. Peet*, 806.
12. LAW WHICH GIVES CHARACTER TO CASE, AND BY WHICH IT IS TO BE DECIDED, is the law that is inherent in the case, and constitutes a part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated. *Menges v. Dentler*, 616.
13. LAW ENACTED AFTER CASE HAS ARISEN CAN BE NO PART OF IT; such a law can have only a forced and unnatural relation to the case, and must produce an untrue decision, one not of the case arising between the parties, but of a case partly created by the legislature. *Id.*
14. IF, IN ACTION OF EJECTMENT, SUPREME COURT ESTABLISHES RULE OF LAW which is conclusive in favor of the title claimed by one party in whose favor the case is thereupon decided, and afterwards, and before a new suit is instituted to try the title, the successful party sells the land to a bona fide purchaser for value, and after that the supreme court discovers that the rule by which they established the title is an untrue one, and that the case ought to have been decided so as to give the land to the other party, the title of the original unsuccessful party must be treated as lost. *Id.*

15. BILL OF EXCEPTIONS IS NOT PROPER MEDIUM through which to certify to the appellate court matters which must necessarily be a part of the original record in the case. *N. O. etc. R. R. Co. v. Albritton*, 98.
 16. WHERE JUDGMENT OF NONSUIT IS PRESENTED FOR REVIEW, it is essential that all the testimony adduced by the plaintiff on the trial should fully appear of record, and be certified and sent up with it to the supreme court. *Baker v. Lewis*, 598.
 17. ERROR WHICH WORKS NO PREJUDICE IS NOT GROUNDED FOR REVERSAL. *Williams v. Brickell*, 88.
 18. MATTERS ADDRESSED TO DISCRETION OF LOWER COURT, and passed upon there, cannot be reviewed in the appellate court. *Riddle v. Gage*, 151.
 19. MAXIM, DE MINIMUS NON CURAT LEX, is properly applied so as to authorize the affirmance of a judgment for defendant, where the judgment should have been for plaintiff, if the latter's only advantage would be to recover nominal damages. *McConike v. N. Y. etc. R. R. Co.*, 420.
- See ARBITRATION AND AWARD; ASSAULT AND BATTERY; ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; ATTACHMENTS, 3; BONDS, 5, 6; CONDITIONS, 4, 6; CONTRACTS, 8-10; CORPORATIONS, 17, 19, 20; EASEMENTS, 6; EJECTMENT; EQUITTY; ESTATES OF DECEDENTS; EVIDENCE, 5; EXECUTORS AND ADMINISTRATORS, 5; GUARDIAN AND WARD; NEGLIGENCE, 4; NEGOTIABLE INSTRUMENTS; NEW TRIAL; NUISANCES, 4; PARTITION; PAYMENT, 5; PROBATE COURTS; RECEIVERS, 3; RELEASE, 2; SET-OFF; STATUTE OF LIMITATIONS, 1, 5; TRESPASS; WITNESSES.

POLICIES.

See INSURANCE.

POSSESSION.

See ADVERSE POSSESSION; AGENCY, 3; EASEMENTS, 1; EJECTMENT; EXECUTORS AND ADMINISTRATORS, 3; PARTITION, 6; SALE.

PRACTICE.

See PLEADING AND PRACTICE.

PREFERENCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4; COMMON CARRIERS, 4; EXECUTIONS, 4.

PREMIUMS.

See INSURANCE, 5.

PRESCRIPTION.

See ADVERSE POSSESSION; EASEMENTS, 6; NUISANCES, 4.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS, 13-19, 21.

PRESUMPTIONS.

See AGENCY, 3; ASSIGNMENT FOR BENEFIT OF CREDITORS, 16; ATTORNEY AND CLIENT; COMMON CARRIERS, 22; CONDITIONS, 1; CORPORATIONS, 21, 23;

JURISDICTION, 1; LANDLORD AND TENANT, 1; NEGLIGENCE, 5, 7, 8; NEGOTIABLE INSTRUMENTS, 15, 17; PAYMENT, 5; PROBATE COURTS, 1, 5, SCHOOLS, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRIORITY.

See EXECUTIONS, 4; JUDGMENTS, 4; MORTGAGES, 6, 7.

PRISON-BOUND BONDS.

See BONDS, 7, 8.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURTS.

1. PROBATE COURTS HAVE GENERAL JURISDICTION OF THOSE SUBJECTS to which their powers extend, and are entitled to all the presumptions in favor of their proceedings which are allowed other tribunals of general jurisdiction. *Kimball v. Flak*, 213.
2. CONSTITUTION REQUIRING PROBATE COURT TO BE HELD ON CERTAIN DAYS, but containing no negative words, does not divest the probate judge of authority to hold court on any other days. *Id.*
3. PROBATE COURTS HAVE POWER TO ADJOURN whenever they deem it necessary for the transaction of business. *Id.*
4. CONSTITUTION OF MISSISSIPPI HAS NOT CONFERRED UPON PROBATE COURT JURISDICTION OVER LAND of decedent for any purpose whatever. It is only by virtue of the special conditional power conferred by the legislature and restricted in its exercise to the happening of the particular event named in the act, that the probate court can assume to exert any jurisdiction over such land. *Root v. McFerris*, 49.
5. PROBATE COURT HAS NO POWER TO ORDER SALE OF LAND, until the jurisdictional facts and acts prescribed by law have been judicially ascertained of record. But after the fact of jurisdiction is established in the record, over both the subject-matter and the person, then all the presumptions arise in favor of its judgments, which inherently belong to courts of original general jurisdiction. *Id.*
6. JURISDICTION CONFERRED ON PROBATE COURTS BY CONSTITUTION IS GENERAL; but the jurisdiction over lands of decedent conferred upon them by the legislature is special, inferior, and limited. *Id.*
7. PROBATE COURT HAS POWER TO DETERMINE the regularity and sufficiency of evidence that legal notice of a sale of the decedent's property had been given to the heirs; and in the absence of evidence showing the contrary, its judgment upon the question must be presumed to be right. *Mont v. Horne*, 24.
8. RECITALS IN DECREE OF PROBATE COURT that proof was made of publication according to law, and that legal notice of the sale had been given to the heirs, are *prima facie* evidence of due and legal notice. *Id.*

9. UNDER DECREE ON PROBATE COURT directing the sale of "the lands and mills belonging to the estate of the deceased," it is competent to sell any real estate or mills belonging to the deceased within the county. The lands need not be more specifically described in the decree. *Id.*
10. REGULARITY OF PROCEEDINGS IN ORPHANS' COURT CANNOT BE INQUIRED into in a collateral proceeding. *Singerly v. Swain*, 581.
11. TERMS OF ORPHANS' COURT SALE ARE PART OF JUDICIAL DECREE, to be made by the court, and not by the executors or administrators, and may be amended or modified by the court at any time before the record is made up and closed. *Id.*

See JUDICIAL SALES; PARTITION.

PROCESS.

See ATTACHMENTS; CRIMINAL LAW, 17, 18; SHERIFFS.

PROFITS.

See DAMAGES, 5; PARTNERSHIP.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS.

PUFFERS.

See AUCTIONS; JUDICIAL SALES, 2.

PUNITIVE DAMAGES.

See DAMAGES; NEGLIGENCE, 9.

QUANTUM MERUIT.

See CONTRACTS, 8; MASTER AND SERVANT, 2.

QUESTIONS OF LAW AND FACT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 10, 12, 14; CONTRACTS, 5; CRIMINAL LAW, 16; DEEDS, 1.

RAILROADS.

1. RAILWAY COMPANY CONSTRUCTING ITS ROAD OVER OR ACROSS PUBLIC HIGHWAY must, if possible, in so doing cause no inconvenience to the public; but where this cannot be done, the work must be performed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent an obstruction of the highway, the company must build it within a reasonable time, and cannot delay until its road is completed. And this is the rule whether the obstruction of the highway be expressly prohibited in the charter or not. *L. & N. R. R. Co. v. State*, 778.
2. RAILROAD COMPANIES MUST CONSTRUCT AND MAINTAIN CATTLE-GUARDS at farm-crossings, and are liable for injuries to stock rightfully at such crossings, but occasioned in consequence of the companies' neglect to maintain such guards. *Chapin v. Sullivan B. R.*, 237.

2. RAILROAD COMPANIES ARE NOT LIABLE FOR INJURIES TO CATTLE WRONGFULLY running at large, and getting upon their track, even though they have no fence against such stock. *Id.*
 4. RIGHT OF RAILROAD COMPANY IN ITS ROAD-BED, under an arrangement whereby they have the right to construct and use a track, and hold the same for railroad purposes, amounts only to a permissive license, and gives no right to the soil. Any stone, therefore, excavated in grading the track, and not actually used in the construction of the track, belongs to the owner of the land, and cannot be removed without his permission. *Id.*
 5. RAILROAD COMPANY MAY USE STONE AND GRAVEL FROM ONE PORTION OF THEIR LINE in the proper construction of any other portion thereof, even though they do not own the land, but only have a permissive license to use it for railroad purposes. *Id.*
 6. STATUTORY OBLIGATION OF RAILROAD COMPANY TO ERECT AND MAINTAIN FENCE on each side of its track binds them to erect and maintain fences only as against cattle and other stock rightfully running upon the adjoining lands. *Chapin v. Sullivan R. R.*, 207.
 7. FENCES ALONG RAILROAD TRACK ARE FOR BENEFIT OF ADJOINING LANDOWNERS, to prevent their cattle from escaping to the track and there getting killed, and to protect their crops from cattle rightfully on the railroad track. *Id.*
 8. RAILROAD COMPANY IS NOT BOUND TO MAINTAIN FENCES against cattle trespassing either upon lands adjoining their roads or upon their own track. *Id.*
 9. RAILROAD COMPANY IS NOT RESPONSIBLE FOR INJURIES HAPPENING ACCIDENTALLY TO CATTLE TRESPASSING on their track, or for depredations committed by cattle trespassing on their track and thence escaping upon adjacent lands, although it is the neglect of the company to maintain a sufficient fence that enables them to commit the depredations. *Id.*
- See AGENCY, 1; ARBITRATION AND AWARD; BONDS, 1, 2, 4; COMMON CARRIERS; CORPORATIONS; EMINENT DOMAIN; INFUNCTIONS, 1; MASTER AND SERVANT, 2, 5, 6; MORTGAGES, 8; NEGLIGENCE.

RATIFICATION.

See AGENCY, 3.

RECEIVERS.

1. APPOINTMENT OF RECEIVER IN CREDITOR'S SUIT does not of itself effect a transfer of the debtor's real property; that is accomplished by a deed from the debtor. *Chautauque Co. Bank v. Risley*, 347.
2. EVIDENCE OF FRAUD AGAINST CREDITORS need not be produced by one who impeaches a deed of land as against a purchaser from a receiver, if the defendant, to show his own title, introduces the decree appointing the receiver and the receiver's deed to him, and these recite that the appointment was made in a suit by other creditors brought on the ground that the deed was fraudulent. Such recitals estop the purchaser from denying the fraudulent character of the deed. *Id.*
3. Suing RECEIVER WITHOUT LEAVE OF COURT only raises a question of contempt; it does not affect the right involved in the suit. *Id.*

See EXECUTIONS, 7.

RECTALS.

See PROBATE COURTS; RECEIVERS, 2.

RECORDS.

See MORTGAGES, 2.

REDEMPTION.

See MORTGAGES, 10-15.

RELEASE.

1. RELEASE NOT UNDER SEAL will not operate to release the parties defendant in an action for damages caused by an unlawful assault and battery. *Smithwick v. Ward*, 453.
2. RELEASE OBTAINED BY DEFENDANT after action commenced must be specially pleaded in the answer, or in a supplemental answer. *Id.*
3. RELEASE IS DISCHARGE OF DEBT by act of the party. Extinguishment is a discharge by operation of law. *Baker v. Baker*, 242.

REMAINDERS.

See CURTESY.

RENT.

See ASSIGNMENT OF CONTRACTS, 1; CONSTITUTIONAL LAW, 2; MORTGAGES, 14.

RESERVATIONS.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 11, 12, 17; GROWING CROPS, 2-5.

RESISTING OFFICERS.

See CRIMINAL LAW, 17, 18.

RETURN.

See EXECUTIONS.

REVERSAL.

See PLEADING AND PRACTICE, 10, 11, 17-19.

REVERSIONS.

See CURTESY.

REVOCATION.

See LIENHENS, 6.

. SALES.

1. IN SALE OF PERSONAL CHATTELS, delivery of possession is necessary, as against all except the vendor. But as between the vendor and vendee, the property will pass without delivery. *Call v. Gray*, 141.
2. SALE OF PERSONAL PROPERTY, NOT FOLLOWED BY DELIVERY, is VOID at common law as to the creditors of the vendor; but under the Oregon statute such sale is valid as to creditors, if the bill of sale is recorded within ten days thereafter. *Monroe v. Hussey*, 552.

3. **SALE OF LARGE AND CUMEROUS MERCHANDISE** here of grain in bulk may pass the title without actual separation of the quantity sold from a larger mass with which it is mixed, if the acts and declarations of the parties clearly evince an intent to make immediate transfer of ownership. *Kimberly v. Patchin*, 334.
 4. **UNSOUNDNESS OF ARTICLE SOLD AMOUNTS NEITHER TO WANT NOR FAILURE OF CONSIDERATION.** In the absence of warranty, the soundness or unsoundness of the subject-matter of the sale has nothing to do with the consideration. *Eagan v. Call*, 653.
 5. **THERE IS ORDINARILY NO IMPLIED WARRANTY OF SOUNDNESS IN SALES,** but the purchaser takes his own risk as to quality. *Id.*
 6. **RULE OF CIVIL LAW THAT SOUND PRICE IMPLIES WARRANTY THAT ARTICLE SOLD IS SOUND** is not a rule of the common law. *Id.*
 7. **WHERE BUYER HAS HAD OPPORTUNITY OF EXAMINING ARTICLE, THERE IS NO IMPLIED WARRANTY** by the seller against latent defects unknown alike to himself and to the purchaser. *Id.*
 8. **MERE INADEQUACY OF CONSIDERATION WITHOUT WARRANTY OR FRAUD IS NO DEFENSE** to the payment of a bill or note given for the purchase-price of goods, and since the unsoundness of the article sold relates only to the adequacy of the consideration, this can furnish no defense. *Id.*
 9. **GENERAL WARRANTY OF SOUNDNESS DOES NOT EXTEND TO DEFECTS KNOWN OR PLAINLY VISIBLE** to the purchaser, and if the warranty be in writing, parol evidence is nevertheless admissible to charge the purchaser with knowledge of any particular defect. *Fisher v. Pollard*, 740.
- See ATTACHMENTS, 5-7; AUCTIONS; CONTRACTS, 4, 7; CORPORATIONS; EXECUTORS AND ADMINISTRATORS; FRAUD; MORTGAGES, 8-18; NEGOTIABLE INSTRUMENTS, 26; PLEADING AND PRACTICE, 8; PROBATE COURTS; TROVER, 2; VENDOR AND VENDEE.**

SCHOOLS.

1. **SCHOOL-MASTER MAY ENFORCE OBEEDIENCE TO HIS RULES** by use of the rod when necessary, but he must not chastise wantonly and without cause, and the chastisement must be proportionate to the offense and within the bounds of moderation, or the school-master will be liable for an assault and battery. *Anderson v. State*, 774.
2. **IN PROSECUTION FOR ASSAULT AND BATTERY, WHERE RELATION** of school-master and scholar, parent and child, master and apprentice, or any similar relation is established as a defense, the legal presumption is that the chastisement was proper, and to warrant a conviction this presumption must be rebutted by showing that it was excessive, or without any proper cause. *Id.*

SECONDARY EVIDENCE.

See EVIDENCE, 2.

SELF-DEFENSE.

See CRIMINAL LAW, 11, 12.

SERVANTS.

See MASTER AND SERVANT.

SERVICE

See SHERIFFS.

SET-OFF.

DEBT DUE FROM DECEDENT CANNOT BE SET OFF by the defendant in an action brought by an administrator to recover the difference between the sum at which he bid off, at orphans' court sale, part of the real estate of the decedent, and the sum at which it sold on a resale, made necessary by his refusal to comply with his bid. *Singerly v. Swain*, 581.

See COVENANTS, 1.

SHERIFFS.

1. NEGLIGENCE IN SERVING CAPTAS is committed by a sheriff when the person to be arrested is on a temporary visit in the state, and resides out of the state, and the officer has information of that fact, and also that the party will be at a certain place on a certain day, and the officer fails to be there to arrest him, and gives no excuse why he was not there, and the party succeeds in leaving the state without being arrested, by reason of the said failure of the officer. *State ex rel. Jenkins v. Troutman*, 459.
2. WHEN OFFICER IS GUILTY OF NEGLIGENCE IN NOT SERVING WRIT, ORUS IS ON HIM to show that the defendant was insolvent, and that plaintiff was not damaged by his neglect. *Id.*
3. EVIDENCE THAT DEFENDANT AGAINST WHOM WRIT IS DIRECTED WAS INDEBTED TO OTHERS THAN PLAINTIFF is not material upon a question of his insolvency, and should not be allowed. *Id.*
4. WHEN STATUTE REQUIRES ALL WRITS NOT EXECUTED by a sheriff whose term of office has expired to be turned over to his successor in office, an execution received and levied upon property is in a condition to be so turned over. His successor may advertise and sell the property. *Dumais v. Coy*, 133.

See EXECUTIONS.

SHERIFF'S SALES.

See CONSTITUTIONAL LAW, 3; FIXTURES.

SHIPPING.

1. VESSEL IN MOTION MUST, IF POSSIBLE, AVOID ONE MOORED or at anchor, and in case of injury to the latter by the former, no excuse will avail but unavoidable accident, or that *vis major* which no human skill or precaution can guard against or prevent. *Baker v. Lewis*, 598.
2. LAW REQUIRES THOSE IN CHARGE OF MOVING VESSEL TO EXERCISE CONSTANT CARE and vigilance to avoid collision with others. *Id.*
3. IN CASE OF COLLISION, IF BOTH PARTIES ARE AT FAULT, NEITHER CAN RECOVER damages at law. *Id.*
4. FAILURE OF MOVING VESSEL TO KEEP PROPER LOOKOUT is, in case of collision, by the maritime law, regarded as negligence on her part, especially if the omission may have contributed to the disaster. *Id.*
5. RIGHT TO MOOR BOATS AND OTHER CRAFT AT WELL-KNOWN LANDINGS AND WHARVES on a stream is as well secured and protected by law as that of actual navigation. *Id.*

6. **PERSON MOORING HIS CRAFT AT ACCUSTOMED LANDING IS BOUND TO LEAVE SUFFICIENT ROOM** for the passage of other craft; but this is all that the law requires of him. *Id.*
7. **MASTER HAS POWER TO EMPLOY PILOT** on a river steamboat, within the duration of his own term of service, for a longer term than one trip. *Hight v. Robbins*, 118.

SOUNDNESS.

See **SALES**, 4-9.

SPECIFIC PERFORMANCE.

COURT OF EQUITY MAY ENTERTAIN BILL FOR SPECIFIC PERFORMANCE of contract respecting land, situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court; and its decree will be enforceable against the person of the party to compel a performance of the agreement. *Johnson v. Kimbro*, 781.

See **ASSIGNMENT OF CONTRACTS**, 2.

STATUTE OF FRAUDS.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 4; **LIENS**, 7.

STATUTE OF LIMITATIONS.

1. **DEFENDANT, TO AVAIL HIMSELF OF DEFENSE OF STATUTE OF LIMITATIONS, MUST SHOW** by demurrer, plea, or answer that he intends to rely upon it, or he will be held to have waived that defense; and this is so, although it appear on the face of the bill that the time prescribed as a bar has elapsed. *Wilkinson v. Flowers*, 78.
2. **RIGHT OF MORTGAGEE TO FORECLOSE MORTGAGE IS NOT BARRED BY SAME LAPSE OF TIME** that would bar an action on the notes secured by it. *Id.*
3. **MORTGAGEE'S RIGHT TO FILE HIS BILL OF FORECLOSURE ACCRUES** upon the forfeiture of the condition of the mortgage, and the statute of limitations begins to run against such a bill from that time. *Id.*
4. **MORTGAGEE'S RIGHT TO FILE BILL OF FORECLOSURE IS BARRED** by the same lapse of time that would bar an action for the recovery of the possession of the mortgaged premises. *Id.*
5. **IN EQUITY, PLEA OF STATUTE OF LIMITATIONS IS NOT REQUIRED TO BE FORMAL or technical**; a substantial statement of the defense intended to be relied on, which clearly advises the opposite party of its true character, is all that is required. But if the language used is equivocal or subject to two constructions, one of which would present one character of defense and the other a different one, the defendant will not be allowed to avail himself of proof applicable to either. *Id.*
6. **SUIT AGAINST EXECUTOR OF DECEASED STOCKHOLDER, FOR CORPORATE DEBT, IS BARRED** by the lapse of three years from the date of the publication by him of notice of his appointment and qualification as such executor. *N. E. Com. Bank v. Newport Steam Factory*, 688.
7. **COURT OF EQUITY WILL NOT PERMIT DEFENDANT TO AVAIL HIMSELF OF STATUTE OF LIMITATIONS** where the delay in bringing the suit was caused by his own unconscientious conduct in enjoining the collection of the

debt during the time of the running of the statute. *Withness v. Flowers*, 78.

8. STATUTE OF LIMITATIONS IS NOT AVAILABLE AS DEFENSE TO ACTION against foreign corporation in New York. *Nott v. T. R. R. Co.*, 303.

See ADVERSE POSSESSION; EASEMENTS, 6; ESTATES OF DECEDENTS, 3; EXECUTORS AND ADMINISTRATORS, 3; PAYMENT, 5.

STATUTES.

See CONSTITUTIONAL LAW.

STOCK AND STOCKHOLDERS.

See CORPORATIONS, 17-20; STATUTE OF LIMITATIONS, 6.

STREETS.

See HIGHWAYS.

SUBROGATION.

See MORTGAGES, 13.

SUCCESSION.

See ESTATES OF DECEDENTS, 1.

SURETYSHIP.

See JUDGMENTS, 8.

TAXATION.

See ADVERSE POSSESSION, 2.

TELEGRAMS.

See EVIDENCE, 8.

TENANTS.

See LANDLORD AND TENANT.

TENANTS FOR LIFE.

See ADVERSE POSSESSION, 3, 4.

TENANTS IN COMMON.

See CO-TENANCY.

TITLE.

See ACQUISITION; ADVERSE POSSESSION; CONTRACTS, 7; DEEDS; EJECTMENT, 1; ESTATES OF DECEDENTS, 1; GIFTS; JUDGMENTS, 2; PLEADING AND PRACTICE, 14.

TORTS.

See AGENT, 1, 2; ASSAULT AND BATTERY; CORPORATIONS, 16, 24-26; DAMAGES, 2; FRAUD; FRAUDULENT CONVEYANCES; MALICIOUS PROSECUTION; NEGLIGENCE; RELEASE, 1.

TRESPASS.

TRESPASS AND CASE BECOME CONCURRENT REMEDIES WHEN THEY APPROACH DIVIDING LINE so closely as to be scarcely distinguishable from each other, and where no evil is perceptible from adopting either as a remedy. *Van Dresser v. King*, 643.

See AGENT, 2; ASSAULT AND BATTERY; CORPORATIONS, 26; EXECUTIONS, 10; JUDGMENTS, 9, 11, 13; LICENSES, 4, 5; PLEADING AND PRACTICE, 6; RAILROADS; RELEASE, 1.

TROVER.

1. VALUE OF GOODS TAKEN, WITH INTEREST, IS ORDINARY RULE OF DAMAGES in trover, but a jury may go beyond this. *Backenstoss v. Stahler's Adm'rs*, 592.
2. DEFENDANT IN TROVER WHO REPUDIATES POSSESSION OF GOODS UNDER CONTRACT, and claims by a wrongful conversion, cannot claim the benefit of the contract in mitigation of the damages. *Id.*
3. TROVER WILL NOT LIE AGAINST PERSONAL REPRESENTATIVES for a conversion by the deceased in his life-time. *Chapin v. Barrett*, 731.
See EVIDENCE, 1; GROWING CROPS; LICENSES, 2, 3.

TRUSTS AND TRUSTEES.

1. ABSOLUTE CONVEYANCE OF LAND CANNOT BE SHOWN BY GRANTOR BY PAROL to be a grant in trust for himself, no fraud or mistake being alleged. *Sturtevant v. Sturtevant*, 371.
 2. ORDER OF COURT APPROVING ACCOUNT OF TRUSTEE, IN WHICH HE CLAIMS CERTAIN CREDIT, is not conclusive as to his right to such credit, but the court may, at a future time, investigate and restate the account. *Seacell v. Greenway*, 794.
 3. ORDERS PASSING ACCOUNTS OF TRUSTEES MAY BE CONSIDERED AS ORDERS OR JUDGMENTS NIL, subject to be set aside upon future inquiry into the correctness of the accounts. *Id.*
 4. TRUSTEE CANNOT ESTABLISH FACT OF LOSS OF TRUST FUND by his own uncorroborated testimony. *Id.*
 5. TRUSTEE IS ALLOWED TO TESTIFY TO EXTENT OF LOSS BY THEFT OR ROBBERY; but a foundation for this testimony must be first laid by proving the theft or robbery *alunde, semble*. *Id.*
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES, 1; GUARDIAN AND WARD, 10.

UNDUE INFLUENCE.

See DURESS.

USAGE.

See BROKERS; COMMON CARRIERS, 20.

USURY.

RESERVATION OF ILLEGAL RATE OF INTEREST DOES NOT PREVENT RECOVERY of the principal and legal interest thereon. *Philadelphia & S. R. R. Co v. Lewis*, 574.

VENDOR AND VENDER.

1. REALTY PURCHASED WITHOUT NOTICE OF EQUITIES in favor of owner of adjoining land, arising out of verbal agreements between him and the grantor, will not bind the grantee. *Oliver v. Wallace*, 135.
2. FENCE BUILT BY MISTAKE OVER LINE will pass to the purchaser of the land on which it stands, although it was agreed that it should remain the property of the one who erected it. *Id.*
3. PAROL EVIDENCE OF WARRANTY OF QUANTITY OF LAND CONVEYED BY DEED IS INADMISSIBLE, as tending to vary the terms of the instrument. *Cook v. Combs*, 241.

VERDICT.

See ASSAULT AND BATTERY, 2.

VESSELS.

See SHIPPING.

VINDICTIVE DAMAGES.

See DAMAGES, 2, 4, 7.

WAIVER.

See NEGOTIABLE INSTRUMENTS, 12.

WARDS.

See GUARDIAN AND WARD.

WARRANTY.

See SALES, 4-9; VENDOR AND VENDER, 2.

WASTE.

See CO-TENANCY, 4.

WATERCOURSES.

OHIO, THOUGH NOT NAVIGABLE RIVER IN STRICT COMMON-LAW SENSE, IS PUBLIC HIGHWAY for direct navigation of boats, and is, therefore, such for all convenient purposes necessarily appertaining thereto. *Baker v. Lewis*, 598.

See NUISANCES, 3, 4.

WAYS.

See EASEMENTS.

WHARVES.

See SHIPPING, 5; WHARFINGERS.

WHARFINGERS.

1. WHARFINGER, LIKE COMMON CARRIER, MAY MAKE WHAT CONTRACT HE PLEASES AS TO HIS COMPENSATION. *Southern S. Co. v. Sparks*, 793.

2. **WHEN WHARFINGER SPECIFIES HIS RATES OF CHARGES AND GIVES NOTICE TO CUSTOMER IN ADVANCE**, and the latter afterwards makes use of the wharf, he thereby assents to the proposed charges, and cannot refuse to pay them on the ground that they are more than is reasonable or customary; and the same rule applies in the case of tavern-keepers and warehousemen. *Id.*

WILL, TENANCY AT.

See LANDLORD AND TENANT, 5; LEASES, 4.

WILLS.

1. **IN CONSTRUING WILLS, GENERAL RULE IS THAT PERSONS DESCRIBED as a class take as if each individual composing the class had been called by his proper name**, and that each takes a share with other persons named, among whom the division is to be made. There is an exception to this rule, that if there be anything in the will indicating that the testator intended that the persons described in the class shall take as a unit, then the division shall be *per stirpes* and not *per capita*. *Roper v. Roper*, 427.
2. **WHEN WILL DIRECTS DIVISION OF PROPERTY**, but does not specify any time in which it shall be made, it must be made as soon after the death of the testator as the executors are ready to make a final settlement of the estate. *Id.*
3. **WHEN WILL ESTABLISHES FUND** which is to be divided among children of a certain person born, or to be born, any child who shall come of age and demand his share may be required to give security to refund, if the birth of another child shall render it necessary. *Id.*

See CO-TENANCY.

WITNESSES.

1. **TESTIMONY OF WITNESS THAT "HE HAD NOT SAID"** that he knew a certain fact is immaterial, irrelevant, and inadmissible, although elicited for the purpose of contradicting him in case he denied it. *Combe v. Winchester*, 203.
2. **RULE FOR DETERMINING WHEN EVIDENCE IN CONTRADICTION OF WITNESS IS ADMISSIBLE**.—If it is proposed to contradict the answer to a question asked a witness, the question must be such as would be admissible, if proposed, by the party calling him. *Id.*
3. **ANSWER TO QUESTION ADMISSIBLE ONLY ON CROSS-EXAMINATION**, and which is merely collateral, cannot be contradicted. *Id.*
4. **WITNESS CANNOT BE INTERROGATED ON SUBJECT NOT PERTINENT** to the issue, for the purpose of contradicting him. *Id.*
5. **INSTRUCTION IS ERRONEOUS WHICH DENIES TO JURY** the right to consider the direct interest of a witness as party to the suit, in determining the weight to which his testimony was fairly entitled. They being instructed that to disregard his testimony there must be something in his manner or conduct in giving it, or in the testimony of other witnesses sufficient to satisfy their minds that what the witness stated was false. *N. O. etc. R. R. Co. v. Allbritton*, 98.

6. **EXPERT EVIDENCE.**—Practicing physician is a competent witness as a medical expert, even though he is not a graduate of any medical college or institution, and has no license to practice medicine. *Id.*
7. **OPINIONS OF PERSONS SKILLED IN ANY SCIENCE, TRADE, OR ART ARE ADMISSIBLE IN EVIDENCE** upon questions relating to his business or calling. *Jones v. Flach*, 73.
8. **WITNESS SKILLED IN MARKS AND CHARACTERISTICS OF GENUINE BANK BILLS**, from long experience and from having studied the modes by which counterfeit bank bills can be detected, is competent to testify as to the genuineness of a bank bill shown to and examined by him, although he does not know the signatures of the president or cashier of the bank. *Id.*
9. **SURVEYOR'S OPINION AS THAT OF MAN OF SKILL AND SCIENCE** may be admitted in evidence for the purpose of showing that marks on a tree, claimed as a corner, were corner or line marks, but not to show that this was the corner or line between adjoining tracts of land. *Dee ex dem. Olegg v. Fields*, 450.

See EVIDENCE, 9; TRUSTS AND TRUSTEES, 4, 5.

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